(25,923)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 486.

JOHN KENNY, PETITIONER,

vs.

LABAN MILES AND JOHN L. BIRD, ADMINISTRATOR OF THE ESTATE OF LAH-TAH-SAH, DECEASED.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

INDEX.

	Original.	Print
Petition in error	1	1
Exhibit A—Case made from district court of Osage county.	5	3
Transcript from county court	5	3
Petition for letters of administration	8	4
Notice for appointment of administrator	10	5
Order for hearing	12	6
Order appointing administrator	13	7
Letters of administration	14	8
Notice to creditors	15	8
Appraisement	16	9
Final account of administrator	20	12
Objections of John Kenny	22	14
Plea of *res adjudicata*	23	14
Exhibit A—Copy of judgment	25	15
Demurrer of John Kenny	29	18
Order overruling demurrer	30	18

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 7, 1917.

	Original.	Print
Answer of John Kenny	32	19
Motion of Laban Miles to strike	34	20
Order on motion to strike	35	21
Judgment	36	21
Motion for new trial	38	23
Order overruling motion for new trial	40	24
Appeal bond	41	25
Notice of appeal	43	26
Certificate of appeal	47	29
Motion to dismiss appeal	49	29
Agreement for appointment of special judge	52	31
Oath of special judge	54	31
Motion to dismiss appeal overruled	56	32
Demurrer of John Kenny overruled and motion of Laban Miles to strike sustained	59	33
Testimony of Thomas Leahy	61	34
John Kenny	70	40
John McGuire	77	44
A. T. Woodward	81	46
Offers of exhibits, &c	84	48
Laban Miles' Exhibit 1—Petition in Miles *vs.* Kenny	85	49
2—Answer in Miles *vs.* Kenny	87	50
3—Reply in Miles *vs.* Kenny	89	51
4—Decree in Miles *vs.* Kenny	90	52
5—Motion for new trial in Miles *vs.* Kenny	94	54
6—Order on motion for new trial in Miles *vs.* Kenny	95	55
7—Stipulation in Miles *vs.* Kenny	96	56
8—Stipulation in Miles *vs.* Kenny	97	57
9—Oath of appraiser in Miles *vs.* Kenny	98	57
10—Oath of commissioners in Miles *vs.* Kenny	99	58
11—Resignation of commissioner in Miles *vs.* Kenny	100	59
12—Report of commissioners in Miles *vs.* Kenny	101	59
13—Motion to accept report in Miles *vs.* Kenny	103	61
14—Order of sale in Miles *vs.* Kenny	104	62
15—Docket entries in Miles *vs.* Kenny	106	63
16—Decree in Miles *vs.* Kenny	107	63
John Kenny's Exhibit A—Allotment deed to Lah-tah-sah	111	66
John Kenny's Exhibit B—Homestead deed to Lah-tah-sah	113	68
Reporter's certificate	115	70
Final judgment	117	71
Motion for new trial	122	74
Order overruling motion for new trial	126	76
Supersedeas bond	129	77
Certificate of attorneys	132	78

	Original.	Print
Notice of settlement of case made	134	79
Order of settlement of case made	136	81
Motion to strike appeal bond	139	82
Order on motion to strike appeal bond	141	83
Suggestions of amendments to case made	143	83
Order disallowing amendments to case made	146	84
Judge's certificate	147	85
Exhibit B—Transcript from county court in matter of estate of Lah-tah-sah	149	86
Petition for letters of administration	151	86
Notice of application	153	88
Order for hearing	155	89
Order appointing administrator	156	89
Letters of administration	157	90
Notice to creditors	158	91
Inventory	159	91
Oath of administrator	160	92
Order appointing appraisers	160	92
Oath of appraisers	161	93
Certificate of appraisers	161	93
Bill of appraisers	162	94
Final account of administrator	163	94
Objections of John Kenny	165	96
Plea of *res adjudicata*	166	97
Exhibit A—Judgment	168	98
Demurrer of John Kenny	172	100
Order overruling demurrer, &c	173	101
Answer of John Kenny	175	102
Motion to strike answer	177	103
Order to strike	178	103
Decree	179	104
Motion for new trial	181	105
Order on motion for new trial	183	107
Appeal bond	184	107
Notice of appeal	186	109
Certificate of appeal	190	111
Transcript from district court	191	112
Motion to dismiss appeal	191	112
Stipulation for special judge	192	112
Oath of special judge	193	113
Order overruling motion to dismiss	194	114
Order on demurrer, &c	196	115
Judgment	197	115
Motion for new trial	201	118
Order denying motion for new trial, &c	204	120
Clerk's certificate	206	121
Waiver of summons in error	207	121
Order granting time to answer motion to dismiss	208	122
Order granting time to answer motion to dismiss	209	122
Order granting time to answer motion to dismiss	210	122
Order granting time to answer motion to dismiss	211	123

	Original.	Print
Order overruling motion to dismiss	212	123
Order setting for argument, &c	213	124
Order of submission	214	124
Order granting leave to correct case made	215	125
Judgment	216	125
Syllabus	217	126
Opinion	218	126
Petition for rehearing	236	135
Order denying rehearing	246	142
Order recalling mandate	247	142
Clerk's certificate	248	143
Writ of certiorari and return	248*a*	144
Notice of motion to dismiss	248½	146
Motion to dismiss appeal	249	147
Exhibit A—Report of administrator of estate of Lah-tah-sah	257	150
B—Objection, motion, and application of John Kinny	260	152
C—Resignation of administrator	262	153
D—Order for administrator to file final account	264	154
Final report of administrator, &c	265	155
E—Petition of administrator for discharge, &c	268	156
F—Petition for letters of administraton	270	158
G—Notice of application for letters of administration	272	159
H—Order discharging administrator and appointment of successor	274	160
I—Oath of administrator	278	162
J—Bond of administrator	280	163
K—Receipt, Dildine to Bird, for $169.25	283	165
Response and brief resisting motion to dismiss	285	166
Answer of defendant, Laban Miles, to petition for rehearing of plaintiff in error	314	174
Application of plaintiff in error for leave to file second petition for rehearing	331	185
Petition for rehearing	333	186
Opposition of defendant in error to the application of plaintiff in error for leave to file second petition for rehearing	345	193
Order denying leave to file second petition for rehearing	348	195
Opinion, Bleakmore, J	349	195
Clerk's certificate	368	205

1 Filed Sep-. 28, 1915. Wililam H. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 7708.

JOHN KENNY, Plaintiff in Error,

vs.

LABAN MILES and JOHN L. BIRD, Administrator of the Estate of Lah-tah-sah, Osage Allottee No. 256, Deceased, Defendants in Error.

Petition in Error.

The said John Kenny, Plaintiff in Error, complains of the said Defendants in Error, in that in an action pending in the District Court of Osage County, Oklahoma, entitled, "In the Matter of the Estate of Lah-tah-sah, Osage Allottee, #256, deceased, on appeal from the county court to the district court," the said Laban Miles, together with the said John L. Bird, Administrator of the estate of Lah-tah-sah, Osage Allottee #256, deceased, at the regular term of the district court of Osage County, State of Oklahoma, on towit, the 2nd day of April, 1914, recovered a judgment by the consideration of said Court against this plaintiff in error, overruling the demurrer of plaintiff in error to the plea of res adjudicata of the said Laban Miles, defendant in error, and striking out portions of the answer of said John Kenny to the plea of res adjudicata of said Laban Miles, and adjudging and decreeing that the final account of said John L. Bird, Adminstrator of the estate of said Lah-tah-sah, Osage Allottee #256, deceased, be approved, and approving such final account, and adjudging and decreeing that said Laban Miles was the surviving husband, and one of the heirs of said Lah-tah-sah, Osage Allottee #256, deceased, and distributing the estate of said Lah-tah-sah, Osage Allottee #256, deceased, one-half to the said Leban Miles, and one-half to Plaintiff in Error; and, affirming the judgment of the county court of Osage County, Okla-
2 homa, in said matter, rendered on, towit, the 14th day of March, 1914; and overruling the motion of said John Kenny for a new trial, all as shown more fully by the original case made, duly settled, signed and filed in said cause in the District court of Osage County, Oklahoma, which said case made is attached hereto, marked "Exhibit A" and made a part of this petition in error; and by a full, true and correct transcript of record in said cause, duly certified, and hereto attached, marked "Exhibit B" and made a part of this petition in error.

This plaintiff in error herein avers that there is error in said record, judgment and proceedings, in this, towit:

(1) The said district court of Osage County, Oklahoma, erred in

overruling the demurrer of plaintiff in error to the plea of res adjudicata, of said Laban Miles, which overruling was duly excepted to by plaintiff in error at the time.

(2) The said district court committed error of law in sustaining the motion of said Laban Miles, striking out paragraph 2 of the answer of plaintiff in error, to which plaintiff in error excepted at the time.

(3) The said district court committed error of law in sustaining the motion, striking out paragraph 3-*a* of the answer of plaintiff in error, to which plaintiff in error excepted at the time.

(4) The said district court committed error of law in sustaining the motion, striking out paragraph 3-*b* of the answer of plaintiff in error, to which plaintiff in error excepted at the time.

(5) The said district court committed error of law in sustaining said motion, striking out paragraph 3-*c* of the answer of plaintiff in error, to which plaintiff in error excepted at the time.

3 (6) Said district court committed error of law at the trial, and erred, in excluding competent, relevant and material testimony offered by plaintiff in error in his behalf, to which ruling of the court plaintiff in error excepted at the time.

(7) The said district court committed error of law at the trial in admitting, and did admit, incompetent, irrelevant and immaterial testimony, offered by the said Laban Miles, and objected to by plaintiff in error at the time, and to which plaintiff in error at the time excepted.

(8) For errors of law occurring at the trial, and duly excepted to by plaintiff in error at the time.

(9) For the reason that the findings, judgment and decree of said court are not sustained by sufficient evidence, but are contrary to the evidence.

(10) For the reason that the decree, decision and findings of the court are contrary to law.

(11) The said district court erred in sustaining the plea of res adjudicata set up and pleaded by the said Laban Miles; and erred in refusing and denying the plaintiff in error the right to introduce testimony to show that the said Laban Miles was never married to the said Lah-tah-sah, deceased, and that the said Laban Miles is not the surviving husband of said Lah-tah-sah, deceased, and that the said Laban Miles is not an heir at law of said Lah-tah-sah, deseased.

(12) The said district court committed errors of law at the trial in that the said plaintiff in error was not granted a trial de novo in said district court, and was not granted a trial of the rights of heirs to the estate and property of said deceased, to all of which plaintiff in error excepted at the time.

(13) The said district court committed error of law at the trial in refusing, and did refuse, to hear testimony for the purpose of determining the legal heirs of said deceased, and in holding

4 that the issues in that respect were concluded by the findings and judgment set up and contained in the writing marked "Laban Miles' Exhibit 4," a former judgment of the district court

of said county, to all of which plaintiff in error excepted at the time.

(14) The said district court committed error of law at the trial in affirming the judgment, in said matter, of the county court of Osage County, Oklahoma.

(15) The said district court committed error at the trial in not finding a judgment decreeing that plaintiff in error was the sole and only heir at law of the said deceased, and entitled to the whole of said estate.

(16) Said district court committed error of law and erred in overruling the motion of plaintiff in error for a new trial, to which plaintiff in error excepted at the time.

Wherefore, Plaintiff in error prays that said judgment and decree so rendered may be reversed, set aside and held for naught, and that plaintiff in error have a new trial hereof, and be decreed the sole and only heir at law of the said deceased and entitled to the whole of said estate; and that plaintiff in error have all other and further relief to which he may be entitled.

P. H. VAN WINKLE,
E. R. HASTINGS,
Attorneys for Plaintiff in Error.

5 & 6 In the District Court of Osage County, State of Oklahoma.

No. 2372.

In the Matter of the Estate of LAH-TAH-SAH, Osage Allottee, No. 256, Deceased, on Appeal from the County Court to the District Court.

Case-Made.

Be it known that one John Kenny, took an appeal to the District Court of the Twenty-fourth Judicial District of Oklahoma in and for Osage County, Oklahoma, from the proceedings, orders, decrees, and judgments of the County Court of Osage County, Oklahoma, theretofore had, made and rendered by said County Court, in favor of Laban Miles in the above entitled cause, and that in pursuance of such appeal and on, towit, April 1st, 1914, duly certified copies of the notice of such appeal, and of the appeal bond, and of the orders, decrees and judgments appealed from, and of the minutes, records, papers and proceedings in said case, all of which are hereinafter referred to as the transcript, and as shown more fully in said transcript, were filed in the District Court of the Twenty-fourth Judicial District of Oklahoma, in and for Osage County, Oklahoma, in the office of the clerk of said court, which said transcript and certified copies, together with the indorsements thereon, were and are in the words and figures following, towit:

Exhibit A. District Court, State of Oklahoma, County of Osage, Pawhuska, Okla. Filed Jul- 12, 1915. Thos. Leahy, Court Clerk.

7 In the County Court of Osage County, Oklahoma.

No. 389.

In the Matter of the Estate of LAH-TAH-SAH, Osage Allottee, No. 256, Deceased.

Transcript on Appeal to the District Court.

8 *Petition for Letters of Administration.*

In the County Court.

THE STATE OF OKLAHOMA,
Osage County, ss:

Roll No. —.

In the Matter of the Estate of LAH-TAH-SAH, Osage Allottee, No. 256, Deceased.

Comes now Laban Miles, and shows to the Court that Lah-tah-sah departed this life at Pawhuska, in the County of Osage and State of Oklahoma, on or about the 19th day of August, A. D., 1908.

The said decedent was at the time of *his* death a resident of Pawhuska, in the County of Osage and State of Oklahoma.

The decedent left estate in the County of Osage and State of Oklahoma. That due search and inquiry has been made to ascertain if decedent left a will but none has been found, and according to the best information and belief of petitioner, said decedent died intestate.

The general character and probable value of the estate left by decedent is as follows: Lands allotted to her as a member of the Osage Tribe of Indians, in Osage County, Oklahoma, amounting to abou' 660 acres of the approximate yearly rental of $500.00, and tribal trust funds belonging to her as a member of such tribe, and to her credit in the Treasury of the United States, together with oil, gas and other mineral annuities of the approximate yearly income of $600.00.

That the names, ages and residences of the heirs at law of the decedent so far as known to your petitioner, are as follows: Laban Miles, Husband, age 50 years, residence Pawhuska, Okla-
9 homa; John Kenney, Son, age 26 years, residence Fairfax, Oklahoma.

That your petitioner is husband of said decedent and is advised and believes that he is entitled to administer upon said estate. He therefore recommends and requests that John Bird be appointed by the Court as such administrator.

That John Bird for whom letters of administration are herein

prayed is a resident of Osage County, State of Oklahoma, with post-office address at Pawhuska, Oklahoma, in said County.

Wherefore, petitioner prays that letters of administration issue to said John Bird.

LABAN MILES, *Petitioner.*

GRINSTEAD, MASON & SCOTT,
Att'ys for Petitioner.

Endorsed on the back: No. 389. In the Matter of the -State of Lah-tah-sah, Deceased. Petition for Letters of Administration. Filed in the County Court, Osage County, Okla., this 8th day of July, 1912. J. F. Jones, Clerk County Court.

PAWHUSKA, OKLAHOMA, July 8, 1912.

I hereby acknowledge service of the within petition and the receipt of a true copy thereof, the date first above written.

W. M. PETERSON,
Supervisor in Charge, Osage Agency.

10 *Notice of Application for Appointment of Administrator.*

In the County Court, County of Osage, State of Oklahoma.

In the Estate of LAH-TAH-SAH, Osage Allottee, No. 256, Deceased.

The State of Oklahoma to the Heirs Next of Kin, Superintendent of the Osage Agency and Creditors of the said Lah-tah-sah, Deceased:

You are hereby notified that Laban Miles has applied for letters of administrator of said estate to be granted to John Bird, and that said petition will be heard at the Court room of said Court in the city of Pawhuska, in said County and State, on Thursday, the 8th day of August, 1912, at 9:00 o'clock A. M., at which time you may appear and show cause, if any you have, why said petition should not be granted.

Witness my hand and the seal of said Court hereunto affixed this 9th day of July, 1912.

[SEAL.]

J. F. JONES,
Clerk County Court.

STATE OF OKLAHOMA,
Osage County, ss:

I, the undersigned, do solemnly swear that on the 9th day of July, 1912, I posted true copies of the within notice in three public places in Osage County, as follows, one at the Court House, in the City of Pawhuska, one at old Agency Bldg., Pawhuska, and one at City Hall, Pawhuska.

C. S. COOKSEY.

Subscribed and sworn to before me this 9th day of July, A. D., 1912.

[SEAL.] C. T. BENNETT,
County Judge.

11 STATE OF OKLAHOMA,
Osage County, ss:

I, the undersigned, do solemnly swear that on the 9th day of July, 1912, I deposited in the postoffice copies of the within notice, postage prepaid, and addressed to John Kinney, at Fairfax, Okla., at their several places of residence, and that said persons are all of the heirs of the within named decedent.

PAUL B. MASON.

Subscribed and sworn to before me, this 9th day of July, 1912.

[SEAL.] J. F. JONES,
Clerk County Court.

Fees 80¢.

Endorsed on back: No. 389. In the matter of the estate of Lah-tah-sah, Deceased. Notice of Application for Appointment of Administrator. Filed in County Court, Osage Co., Okla., this 9th day of July, 1912. Andrew Joyce, Deputy Clerk County Court.

12 STATE OF OKLAHOMA,
Osage County:

In the County Court of Osage County, State of Oklahoma.

In the Matter of the Estate of LAH-TAH-SAH, Osage Allottee, No. 256, Deceased.

Petition for Letters of Administration

Order for Hearing.

Now, on this 9th day of July, 1912, Laban Miles, having filed in this Court his petition alleging that Lah-tah-sah died intestate on or about the 19th day of August, 1908, leaving property within the jurisdiction of this Court, and praying for the appointment of John Bird as Administrator of said estate.

It is ordered that said petition be and hereby is set for hearing on the 8th day of August, 1912, at the hour of 9 o'clock A. M., and that notice thereof be given by posting notices of such hearing at three public places in said Osage County, Oklahoma, one of which shall be posted up at the County Court house door of this Court, in the City of Pawhuska, Oklahoma, and two in two other public places, and by mailing a notice, with postage prepaid to each of the heirs at law of said decedent as required by law.

[SEAL.] C. T. BENNETT,
County Judge.

Endorsed on back: No. 389. In the Matter of the State of Lah-tah-sah, Deceased. Order for Hearing Petition for Letters of Administration. Filed July 9, 1912. J. F. Jones, Clerk County Court. Recorded in Administrator's Record, Book 1, page 420.

13 *Order Appointing Administrator.*

THE STATE OF OKLAHOMA,
Osage County, ss:

In the County Court.

In the Matter of the Estate of LAH-TAH-SAH, Osage Allottee, No. 256, Deceased.

Now, on this 17th day of August, 1912, there coming on for hearing the petition of Laban Miles for the appointment of John Bird, as administrator of the estate of Lah-tah-sah, Deceased, and petitioner appearing "A" in person and by Grinstead, Mason & Scott, his attorneys, and it being first proven that notice of this hearing has been given by posting of notice for 10 consecutive days in the three public places in Osage County, Oklahoma, one of which was at the County Court house door in the city of Pawhuska, and the last on the 9th day of July, and by mialing copies of said notice on the — day of —— postage prepaid, addressed to the heirs at law of said decedent, resident of this State, so far as known to petitioner, and the Court having heard the evidence offered in support of said petition. "B."—and being fully advised in the premises.

It is ordered, That John Bird be and hereby is appointed administrator of the estate of Lah-tah-sah, Deceased, and that letters of Administration issue to said John Bird upon his taking and subscribing the oath required by law, and executing a bond to the State of Oklahoma, in the sum of Fifteen Hundred & No/100 Dollars, with sureties approved by the Judge of said Court as required by law.

[SEAL.]

C. T. BENNETT,
County Judge.

Endorsed on back: No. 389. In the Matter of the Estate of Lah-tah-sah, Deceased. Order Appointing Administrator. Filed Sep. 9" 1912. J. F. Jones, Clerk County Court. Recorded in Administrator's Record Book 1, page 429.

14 *Letters of Administration.*

STATE OF OKLAHOMA,
Osage County, ss:

In the County Court.

In the Matter of the Estate of LAH-TAH-SAH, Osage Allottee, No. 256, Deceased.

John Bird is hereby appointed Administrator of the estate of Lah-tah-sah, Deceased.

Witness: The hand of C. T. Bennett, Judge of the County Court of Osage County, State of Oklahoma, with the seal thereof affixed the 20th day of November, 1912.

[SEAL.] C. T. BENNETT,
County Judge.

STATE OF OKLAHOMA,
Osage County, ss:

I, John Bird, do solemnly swear that I will perform according to law, the duties of Administrator of the estate of Lah-tah-sah, Deceased, so help me God.

JOHN BIRD.

Subscribed and sworn to before me this 14th day of November, 1912.

[SEAL.] S. S. GOEHRING,
Notary Public.

My Commission expires March 9, 1916.

Endorsed on back: No. 389. In the Matter of the Estate of Lah-tah-sah, Deceased. Letters of Administration. Filed November 29, 1912. Andrew Joyce, Deputy Clerk County Court. Recorded in Administrator's Record Book 1, page 420.

15 In the County Court of Osage County, Oklahoma, Sitting at Pawhuska.

In the Matter of the Estate of LAH-TAH-SAH, Deceased, Osage Allottee, No. 256.

Notice to Creditors.

All persons having claims against Lah-tah-sah, Osage Allottee, No. 256, deceased, are required to present the same with necessary vouchers to the undersigned Administrator, at his office in the Citizens

National Bank of Pawhuska, Oklahoma, within four months of the date hereof, or the same will be forever barred.

Dated Pawhuska, Oklahoma, December 14, 1912.

JOHN L. BIRD,
Administrator.

Endorsed: Received this writ on the 16th day of December, 1912, and executed the same by posting in three publice places in Pawhuska, one at Court House door, one at City Hall, one at old Agency Bldg., (within named defendants) this 16 day of Dec. 1912. Fee 80¢. H. M. Freas, Sheriff. C. S. Cooksey, Deputy.

Endorsed: No. 389, Estate of Lah-tah-sah, Deceased. Notice of hearing and Proof of Posting. Filed in County Court, Osage Co., Okla., this 16th day of December, 1912. Andrew Joyce, Deputy Clerk County Court.

16 In the County Court.

Estate of LAH-TAH-SAH, Deceased.

We, the undersigned, W. E. Savage, J. W. Soderstrom and John A. Gardner, of the above estate, make and return the following true and correct inventory of all the Real Estate and all the goods, chattels, rights, credits and estate of Lah-tah-sah, Allottee 256, deceased, except the homestead, which have come to my possession or knowledge.

Real Estate.

N. W. ¼ Sec. 26, 24, 4, Homestead, App. Value.....	$2,400.00
East ½ of Section 30, Township 28, Range 9, containing 320 acres, App. Value.....	$960.00
Lot 3, E. ½ of S. W. ¼ of N. W. ¼, S. E. ¼ of N. W. ¼ of Sec. 4, Township 20, Range 10, containing 100.12 acres	$300.00
N. ½ of S. E. ¼ of Section 4, Township 20, Range 10, containing 80 acres, Appraised value.....	$240.00
All North and East of the Indian Meridian in Osage County, Oklahoma.	
Total	$1,500.00 2,400.00

Personal Property.

Cash on hand	$210.00

17 Dated this 15th day of January, 1914.

JOHN L. BIRD,
Administrator.

Oath of Executor or Administrator.

STATE OF OKLAHOMA,
Osage County, ss:

John L. Bird, being first duly sworn, says. That he is administrator of the estate of Lah-tah-sah, deceased:

That the above inventory by him made contains a true statement of all the estate of said decedent, except the homestead, that has come to his knowledge and possession and particularly all of the moneys belonging to said decedent, and of all just claims of said decedent against Lah-tah-sah.

JOHN L. BIRD,
Administrator.

Subscribed and sworn to before me this 24th day of January, A. D., 1914.

[SEAL.]

C. E. LAKE,
Notary Public.

My Commission expires Mar. 7, 1915.

Order Appointing Appraisers.

In the County Court in and for Osage County, State of Oklahoma.

In the Matter of the Estate of LAH-TAH-SAH, Osage Allottee, 256, Deceased.

Now, on this 7th day of January, 1914, it is hereby ordered that W. E. Savage, J. W. Soderstrom, John A. Gardner, of Osage County, State of Oklahoma, be and are hereby appointed appraisers of the estate of Lah-tah-sah, Allottee 256, deceased, within the County of Osage, in said State; and are hereby directed to view and appraise said estate, and make return of said appraisement as provided by law.

[SEAL.]

CHARLES R. GRAY,
Special County Judge.

18 STATE OF OKLAHOMA,
Osage County, ss:

I, Belva L. Moore, Clerk of the County Court in and for the County and State aforesaid do hereby certify *that* the above and foregoing to be a true copy of the original thereof, as the same appears on record in my office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this — day of January, 1914.

[SEAL.]

BELVA L. MOORE,
Clerk of the County Court.

Oath of Appraisers.

STATE OF OKLAHOMA,
Osage County, ss:

I do solemnly swear that I will truly, honestly, and impartially appraise the property exhibited to me as belonging to the estate of Lah-tah-sah, R. No. 256, deceased, according to the best of my knowledge and ability and that I am disinterest- in said estate. So help me God.

J. W. SODERSTROM,
W. E. SAVAGE,
JOHN A. GARDNER,
Appraisers.

Subscribed and sworn to before me this 15th day of Jany. A. D., 1914.

[SEAL.] BELVA L. MOORE,
Clerk C. Court.

Certificate of Appraisers.

We, the undersigned, Appraisers, do hereby certify, that pursuant to the annexed warrant to us directed, we have appraised all the property described and mentioned in the above inventory, which has been to us exhibited, setting down opposite each item in said inventory, in figures, the value in money, as by us determined.

19 Witness our hands, this 15th day of January, A. D., 1914.

J. W. SODERSTROM,
W. E. SAVAGE,
JOHN A. GARDNER,
Appraisers.

Bill of Appraisers.

Estate of Lah-tah-sah, Deceased, to —— ——, Appraisers, Dr.

To compensation for services appraising said Estate, as follows:

One day, at $2.00 per day each	$6.00
Necessary disbursements, as follows: Board	4.50
	$10.50

STATE OF OKLAHOMA,
Osage County, ss:

J. W. Soderstrom, W. E. Savage, and John A. Gardner, the appraisers within named, being duly sworn, each for himself says, that the foregoing bill of items is correct and just, and that the services have been rendered and expenses incurred as therein set forth.

J. W. SODERSTROM, 3.50,
W. E. SAVAGE, 3.50,
JOHN A. GARDNER, 3.50,
Appraisers.

Subscribed and sworn to before me this 15th day of Jan'y A. D. 1914.

[SEAL.] BELVA L. MOORE,
Clerk County Court.

Endorsed on back: No. 389. General Inventory and Appraisement. In the County Court, County of Osage. In the matter of the estate of Lah-tah-sah, deceased. Filed this 28th day of Jan'y, 1914. Belva L. Moore, Clerk County Court. Service of within paper and receipt of copy thereof, acknowledged this — day of Jan. 1914. James A. Carroll, Supt. Osage Agency, per F. A. B.

20 *Annual or Final Account of Administrator or Executor.*

STATE OF OKLAHOMA,
Osage County, ss:

In the County Court of said County.

To the Judge of said Court:

To the undersigned, as the Administrator of the Estate of Lah-tah-sah, Osage Allottee, No. 256, deceased, respectfully submit the following as a full and correct account and report of his administration as such Admr., from November 20, 1912, to the 23rd day of January, 1914, which account exhibits not only the debts which have been paid, but also contains a statement of all the debts which have been presented and allowed during the period embraced in this account.

I charge myself with the following, towit:

Date. Month	day	year.	Items of receipts.	Total amount.
Dec.	11	1912.	Lease.	$240.00
Total amount of moneys received or col.				$240.00

Contra.

I ask myself to be credited with the following payment to creditors of deceased, as per voucher herewith submitted.

Items Paid Out.

Nov. 20, 1912.	Premium on surety bond.....	$15.00
Nov. 20, 1912.	" " " "	$15.00
Total amount	Received.....	$240.00
" "	Paid out	30.00
	Balance due.....	$210.00

(Signed) JOHN L. BIRD.

STATE OF OKLAHOMA,
Osage County, ss:

John L. Bird, being duly sworn, on oath says, that he has read the foregoing account and report of his administration, as the Admr. of the estate of Lah-tah-sah, Osage Allottee 256, deceased,
21 and knows the contents thereof, and that the same are true and correct.

JOHN L. BIRD.

Subscribed and sworn to before me, this 24th day of Jan'y, 1914.
[SEAL.]
D. F. LAKE,
Notary Public.

My commission expires March 7, 1915.

Your administrator (executor) further reports that the debts and claims against said estate have all been paid, leaving the above balance to be distributed between the parties lawfully entitled thereto. Your administrator therefore petitions the Court to determine and find the heirs of said estate, which he is informed and believes to be the following named persona *dne* entitled to said estate as follows:
Laban Miles, surviving husband, one-half,
John Kenney, son, one-half,
and moves the court that said heirs be determined and * * * be allowed to make distribution of said estate, and take receipts therefor, and present the same to the Court and be discharged; all of which is respectfully submitted.

JOHN L. BIRD.

Subscribed and sworn to before me this 24th day of January, A. D., 1914.
[SEAL.]
D. F. LAKE,
Notary Public.

My commission expires Mar. 7, 1915.

Statement of Claims Presented and Allowed.

Name of creditor.	Nature of claim.	Amount, etc.
	None.	

Total amount of claims allowed, none.
Very respectfully submitted, this 24 day of Jan. 1914.
JOHN L. BIRD,
Administrator.

Endorsed on back: No. 389. Annual or Final Account of Administrator or Executor. In County Court of Osage County, Oklahoma. In the matter of the estate of Lah-tah-sah, deceased. Final account of John L. Bird, Adm'r. Filed Jan'y 28, 1914. Belva L. Moore, Clerk. Service of within account and receipt of copy thereof acknowledged this 15th day of Jan. 1914. James A. Carroll, Supt. Osage Agency, per F. A. B.

22 In the County Court of Osage County, Oklahoma.

In the Matter of the ESTATE OF LAH-TAH-SAH, Deceased.

Comes now John Kinney, son of the decedent, and alleges that he is the sole and only heir at law of said Lah-tah-sah, that he is the son of such decedent, that Laban Miles is not an heir of said decedent; and this said John Kinney objects and excepts to the final report of the administrator herein in that said report suggests that Laban Miles is an heir of such decedent, when in truth and in fact he is not.

Wherefore, the said John Kinney prays that this court inquire, ascertain, and determine that the said Laban Miles is not an heir and has no interest in said estate; and that said John Kinney is the sole and only heir and that the whole of said estate be distributed to him and that said report be amended accordingly.

JOHN KINNEY,
By JOHN EMBRY,
His Attorney.

Endorsed: Filed Feb. 28, 1914. Belva L. Moore, Clerk County Court.

Service accepted this 28th day of Feb. 1914.
JAMES A. CARROLL,
Sup't Osage Agency,
By F. A. BAKER.

23 STATE OF OKLAHOMA,
Osage County, ss:

In County Court.

In the Matter of the ESTATE OF LAH-TAH-SAH, Osage Allottee, No. 256, on Hearing of Final Account of Administrator.

Plea of Res Adjudicata.

Comes now Laban Miles and alleges and states that on the 25th day of April, 1913, the District Court of Osage County, Oklahoma rendered a judgment in the case of Laban Miles, plaintiff, versus John Kenny, defendant, in case No. 1896 in said Court, by which judgment the heirs of the estate of Lah-tah-sah, Osage Allottee No. 256, deceased, were ascertained and determined. A copy of said judgment is hereto attached, marked "Exhibit A" and made a part hereof; that in said judgment the validity of the marriage of said Laban Miles and said Lah-tah-sah, deceased, was adjudicated; that the time during which an appeal might have been taken from said judgment of the District Court has long since expired; that no appeal from said judgment has been taken; that said John Kenny appeared

in person and by Hargis & Conwall, his attorneys, at the trial in the above entitled cause wherein said judgment was rendered and participated in the trial thereof, which said trial extended over a period of five days and many witnesses were called by each of the respective parties, and much evidence offered and submitted by the respective parties upon which said judgment was based and rendered. That said Laban Miles and John Kenny are the only parties claiming any interest in said estate. That the subject-matter involved in the District Court judgment was the same as that herein involved as relating to the validity of marriage and determination of ownership; that on Sept. 12, 1908, M. L. Garrett was appointed Administrator of the estate of said Lah-tah-sah, deceased, and fully administered
24 upon the estate, paid all debts and was discharged as such administrator on April 5, 1910.

By reason whereof said Laban Miles alleges that the matter of the determination of the legal heirs of said Lah-tah-sah, deceased, has been fully adjudicated and all matters and claims relating thereto have become and are res adjudicata, and said Laban Miles pleads the same as a bar to the readjudication thereof by this Court and alleges that this court has no jurisdiction thereof.

WHITE & WIDDOWS.
Att'ys for Laban Miles.

25 (EXHIBIT "A.")

In the District Court in and for Osage County, Oklahoma.

No. 1896.

LABAN MILES, Plaintiff,

vs.

JOHN KENNY, Defendant.

Journal Entry.

On the 25th day of April, 1913, same being a regular judicial day of the March 1913 term of said Court, the above entitled cause came on for hearing in its regular order, pursuant to agreement of the parties, before R. B. Boone, Special Judge agreed upon by the parties. The plaintiff appearing in his own proper person and by White & Widdows, his attorneys, and the defendant appearing in his own proper person and by Hargis & Conwell, his attorneys, and all parties waiving trial by jury and announced ready for trial by the Court. And thereupon the plaintiff began introduction of his testimony and said cause was on trial in said court before said Special Judge, all parties being present in their own proper persons and by their attorneys. as hereinabove set forth on the 25th, 26th day- of April, 1913, and on the 26th day of April the trial was adjourned to the 29th day of April, 1913, at noon, at which time said trial was resumed before said

Special Judge, all parties being pre ent in their own proper persons and by their attorneys, and continued on trial from noon of April 29th to May 2nd inclusive, during which said time the plaintiff introduced his testimony and rested and the defendant introduced his testimony and rested and thereupon the plaintiff offered his testimony in rebuttal and rested. And the Court after examination of the pleadings and hearing the arguments of Counsel in behalf of the respective parties, took the case under advisement pursuant to consent and agreement of counsel of the respective parties and stipulation of counsel for both parties filed in said cause; and

26 Now on this 24th day of May, 1913, after due consideration of all the evidence and arguments of counsel and being fully advised in the premises, the court finds the following facts:

That in September, 1907, the Plaintiff, Laban Miles, after having been divorced from his former wife, Wah-shah-she-me-tsa-he, according to Osage Indian custom, entered into an agreement with Lah-ta-sha whereby he and Lah-tah-sah agreed to become man and wife. That both were full-blood members of the Osage Indian Tribe and unmarried at the time. That they thereupon accumed the marriage relation and continued to sustain that relation up to the time of Lah-tah-sah's death on August 19th, 1908, a period of eleven months. That the morning after they assumed such relationship, the defendant, John Kenny, the son af Lah-tah-sah, by a former husband, received a horse given away by Hlu-ah-wah-tah, the brother-in-law of plaintiff, Laban Miles, in honor of the marriage of Laban Miles and Lah-tah-sah, in accordance with Osage Indian cu*m*tom, which horse defendant sold, appropriating the money to hi*w* own use. That on said morning other presents were given in accordance with the custom of Osage Indians at the marriage of Indians of the age of Laban Miles and Lah-tah-sah, and who had been theretofore married. That a feast was given in honor of said marriage on the morning after Laban Miles brought Lah-tah-sah to his home, but neither Laban Miles nor Lah-tah-sah, were at said feast. They Laban Miles and Lah-tah-sah went to the Osage Indian Agent and had themselves enrolled as man and wife, and a trading card was issued to Laban Miles on his own and Lah-tah-sah's quarterly annuities and payments. That Laban Miles and Lah-tah-sah were recognized by the Indians with whom they associated as man and wife until Lah-tah-sah's death. They were also so recognized during this time by the Osage Indian Agency and the Interior Department. That

27 after assuming said relationship in September 1907, they signed various papers to borrow money as man and wife, and held themselves out as such and were so recognized by those who dealt with them in a business way.

Conclusions of Law.

That plaintiff, Laban Miles, and Lah-tah-sah, Osage Allottee No. 256, were husband and wife at the time of the death of said Lah-tah-sah; that plaintiff, Laban Miles, is the surviving husband of said

Lah-tah-sah, and as such is the owner of an undivided one-half interest in and to the lands described in plaintiff's petition.

The court further finds that Lah-tah-sah, Osage Allottee No. 256, died intestate on or about the 19th day of August, 1908, leaving an estate consisting in part of the lands described in plaintiff's petition.

The Court further finds that the plaintiff, Laban Miles, and defendant, John Kenny, above named are the only heirs at law of said Lah-tah-sah, deceased, and as such plaintiff Laban Miles owns an undivided one-half interest, and the defendant John Kenny owns an undivided one-half interest in and to the lands allotted and deeded to said Lah-tah-sah, described in plaintiff's petition, to wit:

N. W. ¼ of Section 36, Township 24, Range 4, N. E. ¼ of Section 30, Township 28, Range 9, S. E. ¼ of Section 30, Township 28, Range 9; Lot 3, E. ½ of S. W. ¼ of N. W. ¼, S. E. ¼ of N. W. ¼, N. ½ of S. E. ¼ of Section 4, Township 20, Range 10, all north and east of the Indian Base and Meridian in Osage County, Oklahoma.

The court further finds that no part of the lands described was ever used, occupied or claimed by said Lah-tah-sah, deceased, or any of the parties to this action as a homestead, and that no part of same was the homestead of said Lah-tah-sah, or any of the parties to this action. The court further finds that the parties hereto have been unable to agree upon a partition or division of said lands.

28 It is therefore ordered, adjudged and decreed by the Court that the plaintiff, Laban Miles, and the defendant, John Kenny, are the owners in common of the lands described, and their respective interests and ownership herein is as follows:

Laban Miles, Plaintiff, Osage Allottee No. 507, an undivided one-half; John Kenny, Defendant, Osage Allottee No. 2857, an undivided one-half; and that the shares of the aforesaid parties and their respective interests in the lands above described as above set forth, be and the same are hereby confirmed. It is further ordered, adjudged and decreed by the Court that partition of said lands be made accordingly; that W. T. Mosier, J. W. Soderstrom and W. E. Savage are hereby appointed commissioners to make partition of said property among the parties according to their respective interests as herein fixed and determined, if such partition can be made without manifest injury. But if such partition cannot be made, the commissioners herein named shall make a valuation and appraisement of the property herein described and make a report of their proceedings to the Court.

R. B. BOONE,
Special Judge.

Endorsed: Filed this the 28th day of Feb. 1914, Belva L. Moore, Clerk of the County Court.

Service of within paper and receipt of a true copy thereof is hereby acknowledged this 28th day of Feb. 1914.

W. P. HAYGOOD,
Ass't Supt. Osage Indian School.

3—1093

29 In the County Court of Osage County, Oklahoma.

In the Matter of the Estate of LAH-TAH-SAH, Osage Allottee 256, Deceased.

Demurrer of John Kenny.

Comes now John Kenny and demurs to the plea of res adjudicata and hearing on final account, filed by Laban Miles, for the reasons following:

1. The District Court of Osage County, Oklahoma, rendering the findings and judgment therein pleaded was without jurisdiction to render a final binding judgment therein.
2. The former administration pleaded was invalid for the Court had no jurisdiction of the persons or subject matter, and said Laban Miles is estopped from pleading same.
3. Said plea does not state facts entitling said Laban Miles to any right or relief—all as appear from said plea.

EMBRY & HASTINGS,
Att'ys for John Kinny.

Endorsed: Filed Feb. 28, 1914, Belva L. Moore, Clerk County Court.

Service acknowledged this 28th day of Feb. 1914.

JAMES A. CARROLL,
Supt. Osage Agency.
By F. A. BAKER.

30 STATE OF OKLAHOMA,
Osage County, ss:

In the County Court.

In the Matter of the Estate of LAH-TAH-SAH, Osage Allottee, No. 256, Deceased.

Journal Entry.

Now on this 28th day of February, 1914, the above entitled matter came on for hearing and settlement of final account of administrator and determination of heirs, pursuant to order of Court made and entered on the 28th day of January, 1914, pursuant to due and legal notice. Claimant, John Kenny, appearing by John Embry, his attorney, filed his objections to the final account of the administrator and claiming to be the sole heir of Lah-tah-sah, deceased, and that the whole of said estate be distributed to him, and asked that said report be amended accordingly. Thereupon the claimant, Laban Miles, appeared by White and Widdows, his attorneys, and filed a plea of res adjudicata as to the determination of heirs, with copy of judgment rendered in the District Court of Osage County,

Oklahoma, in cause No. 1896, wherein Laban Miles was plaintiff and said John Kenny defendant. Thereupon said John Kenny by his attorney, John Embry, filed a demurrer to said plea of res adjudicata. And the Court having heard the argument of counsel and being fully advised in the premises finds that said demurrer should be overruled.

It is therefore ordered, adjudged and decreed that said demurrer be and the same hereby is by the Court overruled. To which ruling of the Court the said John Kenny objects and excepts, which objections and exceptions are by the Court allowed, and said John Kenny is given till and on March 12, 1914, to answer said plea.

It is further ordered by the Court that the above entitled matter be and the same hereby is continued to the 14th day of March, 1914, at 9 A. M. for further hearing on settlement of said final
31 account.

[SEAL.] CHAS. R. GRAY,
Special Judge.

O. K.
WHITE & WIDDOWS,
Att'ys for Laban Miles.

O. K.
EMBRY & HASTINGS,
Att'ys for John K.

Endorsed: Filed Mar. 14, 1914, Belva L. Moore, Clerk County Court.

Added by stipulation "Recorded in P. J. 3, pages 333 & 334."

32 In the County Court in and for Osage County, State of Oklahoma.

In the Matter of the Estate of LAH-TAH-SAH, Osage Allottee, No. 256, Deceased, on Hearing of Final Account of Administrator.

Answer of John Kenny.

Comes now John Kenney and answering the plea of res adjudicata filed herein by Laban Miles, denies each and every allegation therein contained, except such as herein expressly admitted.

(2) For further answer, this John Kenny denies that said Laban Miles was ever married to decedent, or became or is the husband or heir of decedent.

(3) And further answering, John Kenney, alleges:

(*a*) That said previous administration was a nullity and of no effect, as the Court was without jurisdiction, and the said Laban Miles, having petitioned for this administration, is estopped to plead any previous administration.

(*b*) That the District Court rendering the judgment set up in said plea and referred to as the action between Laban Miles, plain-

tiff, and John Kenney, defendant, was without jurisdiction to hear or determine the same or to render any judgment therein, that the lands therein described were the restricted lands and allotments of the decedent, and that the decedent was a full blood Osage allottee who had not received a certificate of competency.

(*c*) That said decedent, said Laban Miles and said John Kenny are and were members of the Osage Tribe of Indians, of the full blood, residing in Osage County, Oklahoma, neither of whom
33 have received a certificate of competency, and all of whom were and are incompetent Indians; and the Secretary of the Interior refused and failed to confirm or approve said judgment and proceedings of said District Court, and the same is void and of no effect.

EMBRY & HASTINGS,
Attorneys for John Kenney.

Endorsed: Service accepted this 12th day of March, 1914.

JAMES A. CARROLL,
Superintendent,
Per F. A. B.

Endorsed: Filed Mar. 12, 1914. Belva L. Moore, Clerk County Court.

34 In the County Court of Osage County, State of Oklahoma.

In the Matter of the Estate of LAH-TAH-SAH, Osage Allottee, No. 256, Deceased, on Hearing of Final Account of Administrator.

Motion.

Comes now Laban Miles, by White & Widdows, his attorneys, and moves the Court to strike all that part and the parts of the answer of John Kenney to the Plea of Res Adjudicata of Laban Miles, designated as (2), (3), and (*a*), (*b*), and (*c*), for the following reasons:

First. That each and all of said matters so designated in said answer are Res Adjudicata and have been passed on by this Court in the ruling on the Demurrer of said John Kenny to said Plea of Res Adjudicata.

Second. For the reasons that said matters and things designated as herein above stated are surplusage and incumbrance of the record and said John Kenny is precluded by the Plea of Res Adjudicata from introducing any evidence in support of any allegation therein contained.

WHITE & WIDDOWS,
Attorneys for Laban Miles.

Endorsed: Filed Mar. 14, 1914. Belva L. Moore, Clerk County Court.

Service of within paper and receipt of a true copy thereof is hereby acknowledged this 14 day of March, 1914.

JAMES A. CARROLL,
Sup't Osage Indian School,
Per N. R.

35 STATE OF OKLAHOMA,
County of Osage:

In the County Court.

In the Matter of the Estate of LAH-TAH-SAH, Osage Allottee No. 265, Deceased.

Journal Entry.

Now on this 14th day of March, 1914, the above entitled matter coming on for hearing upon motion of Claimant, Laban Miles, to strike that part of the answer of John Kenny, to the plea of res adjudicata, designated as (2), (3), and (*a*), (*b*) and (*c*), and the Court having heard the argument of counsel and being fully advised in the premises finds that said motion should be sustained as to that part of said answer designated as "(2)" and overruled as the parts designated as "(3)", and "(*a*)", "(*b*)", and "(*c*)",

It is therefore ordered, adjudged and decreed by the Court that said motion be and the same hereby is sustained as to that part of said answer designated as "(2)", and overruled as to that part of said answer designated as "(3)", and "(*a*)", "(*b*)" and "(*c*)", and to part sustained the said John Kenney excepts, and to the parts overruled the said Laban Miles excepts.

[SEAL.] CHAS. R. GRAY,
Special Judge.

Endorsed: Filed Mar. 16, 1914. Belva L. Moore, Clerk County Court. Recorded in P. J. 3, Pages 334 and 335.

36 STATE OF OKLAHOMA,
County of Osage, ss:

In the County Court.

In the Matter of the Estate of LAH-TAH-SAH, Osage Allottee, No. 256, Deceased.

Journal Entry.

Now on this 14th day of March, 1914, the above entitled matter coming on for hearing before Chas. R. Gray, Special Judge, pursu-

ant to continuance as per Journal Entry in said matter made and rendered on the 28th day of February, 1914; claimant, Laban Miles, appearing by White & Widdows, his attorneys; and claimant, John Kenney, appearing by John Embry and A. S. Sands, his attorneys, and further appearing in his own proper person; and the Court having heard the evidence and the arguments of counsel, and being fully advised in the premises finds:

That the final account rendered by John L. Bird, administrator of the estate of said Lah-tah-sah, deceased, is true and correct, that said administrator has made no profit out of said estate and has made disbursements as stated in said accounts, and statement of disbursements since rendition of said final account, and that said disbursements should be approved.

The Court further finds that the Administrator is entitled to the sum of $12.00 as commission on amount of money belonging to said estate received and accounted for by said administrator.

The Court further finds from the evidence that the sole and only heirs of said Lah-tah-sah, deceased, are Laban Miles, surviving husband, and John Kenny, the only issue of said Lah-tah-sah, deceased, and that upon her death the entire estate of said Lah-tah-sah, deceased, descended in equal shares to said Laban Miles and said John Kenny, to wit: An undivided ½ to each.

37 It is therefore Ordered, adjudged and decreed by the Court that the final account of John L. Bird, administrator, of said estate, be, and the same hereby is, by the Court approved, and that said John L. Bird, deduct from the money in his hands, belonging to said estate, the sum of $12.00 as compensation for services rendered as administrator in said estate, and file a receipt therefor, in this Court; that said administrator pay the Court costs now due and unpaid, out of the money in his hands, belonging to said estate, and file receipt therefor in this Court.

It is further ordered, adjudged and decreed by the Court, that the sole and only heirs of Lah-tah-sah, deceased, are Laban Miles, surviving husband, and said John Kenny, the only issue of said Lah-tah-sah, deceased; that upon the death of said Lah-tah-sah, deceased, her entire estate descended in equal shares to said Laban Miles and said John Kenney, towit: an undivided ½ thereof to each, and that upon the payment of costs and administration fees, as herein above provided, said administrator pay the remainder of the money now in his hands belonging to said estate, one-half to said Laban Miles, and one-half to said John Kenny, and take their receipt therefor and file same in this Court and thereupon be discharged. To all of which findings and judgment of the court said John Kenney excepts and upon his request the court fixes appeal bond at Three Hundred Dollars.

[SEAL.]

CHAS. R. GRAY,
Special Judge.

O. K. WHITE & WIDDOWS,
Att'ys for Laban Miles.

O. K. JOHN EMBRY,
Att'y for John Kenney.

Endorsed: Filed this the 16 day of March 1914. Belva L. Moore, Clerk of the County Court. Recorded in P. J. 3, Pages 335 and 336.

38 In the County Court of Osage County, Oklahoma.

In the Matter of the Estate of LAH-TAH-SAH, Roll No. 256, Deceased.

Motion for New Trial.

Comes now the said John Kenney, as heir at law of said deceased, and moves the court to vacate and set aside the final orders, decree and judgment herein rendered on the 14th day of March, 1914, and grant a new trial, for the following causes, which effect materially the substantial rights of the said John Kenney, as heir of said deceased.

1. Irregularity in the proceedings of the Court, by which said party was prevented from having a fair hearing and trial.
2. Irregularities in the proceedings of the prevailing party, Laban Miles, by which the said party, John Kenney, was prevented from having a fair trial.
3. Irregularity in the orders of the Court by which said party, John Kenney, was prevented from having a fair trial.
4. Misconduct of the prevailing party, Laban Miles.
5. Accident and surprise, which ordinary prudence could not have guarded against.
6. Excessive awards and allowances and interests in said estate assigned the prevailing party, Laban Miles, appearing to have been given under the influence of passion or prejudice.
7. Error in the assignment of the amount of recovery by Laban Miles.
8. That the decision and decree of the Court is not sustained by sufficient evidence.
9. That the decision, decree, and final orders of the Court are contrary to law.

39 10. Error of law occurring at the trial, and excepted to by the party making this application, John Kenney.

11. Error of the Court in overruling the demurrer of John Kenney, to the plea of res adjudicata of Laban Miles.
12. Error of the Court in sustaining the motion of Laban Miles, to strike from the pleading of John Kenney, parts thereof, including paragraph 2.
13. Error of the Court in sustaining the plea of res adjudicata set up and plead herein by Laban Miles.
14. Error — the Court in refusing to admit the testimony of John Kenney, and other witnesses offered to show that Laban Miles was not married to the deceased; was not a husband of the deceased, and is not entitled to share in said estate or its assets.
15. The court erred in refusing to hear testimony and admit evidence for the purpose of determining the legal heirs of said deceased.
16. The court erred in holding that the heirs at law of said

deceased had been legally determined by a court of competent jurisdiction.

17. The court erred in sustaining the oral motion of Laban Miles, to order and decree an approval of the accounts of the Administrator herein, and a distribution of the assets of said estate.

18. The court erred in admitting evidence in support of the plea of Laban Miles, setting forth a prior adjudication and determination by the District Court of said County of the heirs of said deceased, and holding that Laban Miles is entitled to participate in the assets of the estate.

EMBRY & HASTINGS AND
A. S. SANDS,
Attorneys for John Kenney.

Endorsed: Filed Mar. 17, 1914. Belva L. Moore, Clerk County Court.

40 In the County Court of Osage County, Oklahoma.

In the Matter of the Estate of LAH-TAH-SAH, Osage Allottee, No. 256, Deceased.

Journal Entry.

This cause coming on to be heard this 19th day of March, 1914, one of the judicial days of the January 1914 term of said Court, upon the Motion for New Trial of John Kenney, as heir of said deceased, and all parties interested being represented by their respective attorneys, after presentation of said Motion and examination of the same by the Court, and the Court being fully advised in the premises, the said Motion is by the Court overruled and denied, to which ruling the said John Kenny in open court duly excepts, and said exception is by the Court allowed.

CHAS. R. GRAY,
Special Judge of County Court in Probate.

O. K.
WHITE & WIDDOWS,
Attorneys for Laban Miles.

O. K.
EMBRY & HASTINGS AND
A. S. SANDS,
Attorneys for John Kenny.

Endorsed: Filed Mar. 21, 1914, Belva L. Moore, Clerk County Court. Recorded in P. J. 3—pages 340 and 341.

41 In the County Court of Osage County, Oklahoma.

In the Matter of the Estate of LAH-TAH-SAH, Osage Allottee, Roll No. 256, Deceased.

Appeal Bond.

Whereas, on March 14th, 1914, in the Matter of the Estate of Lah-tah-sah, Osage Allottee No. 256, deceased, pending in the County Court of Osage County, Oklahoma, upon the final report of the administrator, and for the settlement of such final account, and for distribution of said estate, and upon the pleadings and issues therein between Laban Miles and John Kenney, contesting claimants, the said Laban Miles by the judgment and consideration of said court was adjudged to be one of the heirs of said Lah-tah-sah, deceased, and entitled to one-half interest in said estate, and to receive one-half of the money in the hands of the administrator, after payment of costs and fees of administration, and the Administrator's account being also settled in said decree; and,

Whereas, said John Kenney, has appealed therefrom to the District Court of said Osage County, upon both questions of law and fact, and the Judge of said County Court having fixed the amount of said appeal bond at $300.00.

Now, therefore, we, John Kenney, as principal, and F. W. Farrar, residing at Pawhuska, Oklahoma, and Necia Kenney, residing at Fairfax, Oklahoma, hereby undertake and bind ourselves to the State of Oklahoma, in the full sum of $300.00 that the appellant John Kenney, will prosecute his appeal with due diligence to a determination, and will abide, fulfill and perform whatever judgment, decree or order may be rendered, against him in that proceeding by the District Court, and that he will pay all damages which
42 the opposite party may sustain by reason of such appeal, together with all costs that may be adjudged against him.

Witness our hands this 14th day of March 1914.

JOHN KENNEY.
F. W. FARRAR.
NECIA KENNEY.

The above undertaking filed and the same and sureties thereon approved this 20" day of March, 1914.

CHAS. R. GRAY,
Special Judge County Court,
Osage County, Oklahoma.

STATE OF OKLAHOMA,
County of Osage, ss:

F. W. Farrar and Necia Kenney, being duly sworn, each for himself says that he is one of the sureties on the foregoing bond, and that

he is worth in property, subject to execution the sum of $600.00 over and above his debts, liabilities and exemptions.

F. W. FARRAR.
NECIA KENNEY.

Subscribed and sworn to before me this 15" day of March, 1914.
[SEAL.] WILLIAM A. DANIELS,
Notary Public.

My commission expires Oct. 19, 1916.

Endorsed: Filed March 21, 1914. Belva L. Moore, Clerk County Court.

43 STATE OF OKLAHOMA,
County of Osage, ss:

In the County Court of Osage County, Oklahoma.

In the Matter of the Estate of LAH-TAH-SAH, Osage Allottee, No. 256, Deceased.

To John Bird, Administrator; Laban Miles, Claimant, and White & Widdows, his attorneys of record, and the Judge of said Court, and Hon. Chas. R. Gray, Special Judge in said cause and court, and all persons interested in the above entitled estate:

Notice is hereby given that John Kenny, heir at law of Lah-tah-sah, Osage Allottee No. 256, Deceased, and claimant to the estate of said decedent, appeals to the District Court of Osage County, Oklahoma, on both question of law and fact, from the County Court of Osage County, Oklahoma, and the judgment rendered in said Court, in the above entitled matter, by the Hon. Chas. R. Gray, Special Judge, on, to wit: March 14, 1914, finding that the said Laban Miles is the surviving husband and heir of the said Lah-tah-sah, deceased, and distributing to the said Laban Miles, one-half of the estate of the said Lah-tah-sah, deceased, which said judgment and order, omitting the formal parts, is in substance as follows, to wit:

"Now on this 14th day of March, 1914, the above entitled matter coming on for hearing before Chas. R. Gray, Special Judge, pursuant to continuance as per Journal Entry in said matter made and rendered on the 28th day of February, 1914, Claimant Laban Miles, appearing by White & Widdows, his attorneys, and Claimant, John Kenney, appearing by John Embry and A. S. Sands, his
44 attorneys, and further appearing in his own proper person; and the Court having heard the evidence and the argument of counsel, and being fully advised in the premises, finds:

That the final account rendered by John L. Bird, administrator of the estate of said Lah-tah-sah, deceased, is true and correct, and that said administrator has made no profit out of said estate and has made disbursements as stated in said account, and statement of disbursements since rendition of said final account, and that said disbursements should be approved.

The court further finds that the administrator is entitled to the sum of $12.00 as commission on amount of money belonging to said estate received and accounted for by said administrator.

The Court further finds from the evidence that the sole and only heirs of said Lah-tah-sah, deceased, are Laban Miles, surviving husband, and John Kenney, the only issue of said Lah-tah-sah, deceased, and that upon her death the entire estate of said Lah-tah-sah, deceased, descended in equal shares to said Laban Miles and said John Kenney, to-wit: an undivided one-half to each.

It is therefore ordered, adjudged and decreed by the Court that the final account of John L. Bird, administrator, of said estate be, and the same is hereby, by the Court approved, and that said John L. Bird deduct from the money in his hands, belonging to said estate, the sum of $12.00 as compensation for services rendered as administrator in said estate, and file a receipt therefor in this Court; that said administrator pay the court costs now due and unpaid, out of the money in his hands, belonging to said estate and file a receipt therefor in this Court.

It is further ordered, adjudged and decreed by the court that the sole and only heirs of Lah-tah-sah, deceased, are Laban Miles,
45 surviving husband, and said John Kenney, the only issue of said Lah-tah-sah, deceased; that upon the death of the said Lah-tah-sah, deceased, her entire estate descended in equal shares to said Laban Miles and said John Kenney, to-wit: an undivided one-half thereof to each, and that upon the payment of costs and administration fees, as hereinabove provided, said administrator pay the remainder of the money now in his hands belonging to said estate, one-half to said Laban Miles, and one-half to said John Kenney, and take their receipt therefor and file same in this Court and thereupon be discharged.

To all of which findings and judgment of the Court, said John Kenney excepts, and upon his request the Court fixes the appeal bond at Three Hundred ($300.00) Dollars.

Second.

And appeals to said District Court from the subsequent order of said County Court, overruling motion for new trial in said cause.

Third.

And appeals to said District Court from the previous order of said County Court, on, to-wit: February 28, 1914, overruling demurrer of said John Kenney to the plea of res adjudicata filed in said matter and cause by said Laban Miles, and upon said question of law the said John Kenney will rely principally upon the grounds that the findings, judgment and decree of the District Court of Osage County, Oklahoma, in the case of Laban Miles vs. John Kenney, defendant, a copy of which is attached to said plea of res adjudicata, is not res adjudicata of the issues therein involved and does not estop the said John Kenney from disputing the findings, and judgments

therein contained, and that the said Lah-tah-sah, John Kenney, and Laban Miles, were, and are full blood, incompetent Osage
46 Indians, members of the Osage Tribe of Indians, residing in Oklahoma, to whom no certificates of competency have ever been issued, and that said judgment and decree was an attempt to partition the restricted allotments and lands of the said Lah-tah-sah, deceased, and the said findings, judgment and proceedings have never been approved by the Honorable Secretary of the Interior.

Fourth.

And appeals to said District Court from the previous order of the said Hon. Chas. R. Gray, Special Judge, rendered on, to-wit: March 14, 1914, striking out of the second paragraph of the answer of the said John Kenney, and that the said John Kenney on said question, intends to rely principally upon the grounds that the said Laban Miles was not married to said deceased, and did not become, and is not the husband or heir of said decedent, and that the said John Kenney is entitled to introduce proof to show that the said Laban Miles was never married to the decedent, and was not the husband of the decedent, and is not an heir of the decedent.

That the said judgments and orders made and rendered in said County Court by the said Special Judge thereof, directed the distribution of the estate, and part of the estate of the said Lah-tah-sah, deceased, and were judgments, decrees and orders of said court affecting the substantial rights of this said appellant, John Kenney.

And said John Kenney will ask a trial de novo in said District Court, to the end that he may be decreed the sole heir of said decedent, and that the whole of said estate be distributed to him.

JOHN KENNEY,

By JOHN EMBRY,
Attorney for John Kenney.

A. S. SANDS,
EMBRY & HASTINGS,
Attorneys for John Kenney.

Service of the foregoing and a copy thereof acknowledged and received this 20th day of March, 1914.

WHITE & WIDDOWS,
Att'ys for Laban Miles.

CHAS. R. GRAY.
JOHN L. BIRD.

Endorsed: Filed Mar. 21, 1914, Belva L. Moore, Clerk County Court.

47 STATE OF OKLAHOMA,
County of Osage, ss:

In the County Court.

Certificate of Appeal.

I, Chas. R. Gray, Judge of said County Court, in the above entitled cause do hereby certify that the within and foregoing is a full, true and correct transcript and copy of the Appeal Bond, Notice of Appeal, Judgment and Decree appealed from, and of the minutes, records and papers and proceedings in said cause, as the same appears of record in this office.

Cost of transcript $6.50, due County Court.

[SEAL.] CHAS. R. GRAY,
Special Judge of said Court.

Attest:
[SEAL.] BELVA L. MOORE,
Clerk of said Court.

Endorsed: District Court, State of Oklahoma, County of Osage. Filed Apr. 1, 1914, Thos. Leahy, Jr., Clerk District Court, by A. B. Cotter, Deputy.

48 Be it known that on, towit, March 1st, 1915, the said Laban Miles filed in said cause and court, his motion to dismiss said appeal, which motion, together with all the indorsements thereon, was and is in the words and figures following, towit:

49 STATE OF OKLAHOMA,
County of Osage, ss:

In the District Court of Osage County, Oklahoma.

No. 2372.

In the Matter of the Estate of LAH-TAH-SAH, Osage Allottee #256, Deceased, on Appeal from the County Court to the District Court.

Motion to Dismiss Appeal.

Comes now Laban Miles, Osage Allottee No. 507, a party in interest and moves the court to dismiss the above entitled matter and the appeal thereof for the following reasons:

1st. That the court has no jurisdiction of the subject matter involved.

2nd. That the District Court has no appellate jurisdiction in probate matters wherein the decedent at the time of death was an enrolled Osage Indian to whom no certificate of competency had been issued.

3rd. That the court has no jurisdiction to change, modify, affirm or reverse the decision and judgment of the County Court rendered in the above matter, determining and ascertaining the legal heirs of said Lah-tah-sah, deceased, for the reason that by an act of Congress approved April 18th, 1912, (Public No. 125), provided that the property of deceased Osage Allottees shall, in probate matters be subject to the jurisdiction of the County Court.

H. P. WHITE,
Attorney for Laban Miles.

Endorsed: Filed this the 1st day of March, 1915, Thos. Leahy, clerk of the Dist. Court, by Eula B. Foley, Deputy Clerk.

50 Be it known that thereafter, towit, on March 1st, 1915, Hon. R. H. Hudson, District Judge of the Twenty-fourth Judicial District in and for said Osage County, being disqualified to serve as such Judge in said cause by reason of having been counsel for one of the parties, it was agreed by counsel for the said appellant, John Kenny, and Appellee, Labin Miles, that, in lieu of, an election of a special Judge, the Hon. A. R. Museller, a duly qualified and acting member of the bar, be and he was agreed upon as special Judge to try the issues of the above entitled cause and to continue to act as special Judge in said cause from term to term until the appeals, if any, should be taken in said case, were perfected, which agreement was duly filed in said cause on the 15th day of March, 1915, in the office of the Clerk of said Court, and is, together with all endorsements thereon, in the words and figures following, towit:

This page as per stipulation, corrected to read as follows: (see next page.)

51 Be it known that thereafter, towit, on March 1st, 1915, Hon. R. H. Hudson, District Judge of the Twenty-fourth Judicial district in and for Osage County, Okla., being disqualified to serve as such judge in said cause by reason of having been counsel for one of the parties, it was agreed by and between counsel of record for said appellant, John Kenny, and counsel of record for appellee, Laban Miles, that, in lieu of an election of a special Judge, the Hon. A. R. Museller, a duly qualified and acting member of the bar of said 24th Judicial District, and a resident of Osage County, Oklahoma, who was not disqualified, be, and he was agreed upon as special judge to hear, decide, and try the issues and render judgment in said cause in the same manner and to the same effect as said disqualified district judge could have rendered but for his disqualification, and to continue to act as such special judge in said cause from term to term until the appeals, if any should be taken in said cause, were perfected, which agreement was duly filed in said cause on the 15th day of March, 1915, in the office of the clerk of said court, and is, together with all endorsements thereon, in the words and figures following, towit:

52 STATE OF OKLAHOMA,
County of Osage:

In the District Court of Osage County, Oklahoma.

No. 2372.

In the Matter of the Estate of LAH-TAH-SAH, Osage Allottee #256, Deceased, on Appeal from the County Court to the District Court.

Now on this 1st day of March, 1915, the same being a regular judicial day of the March, 1915, term of said court, the Hon. R. H. Hudson, District Judge of the Twenty-fourth Judicial District, being disqualified to serve as such in the above entitled cause by reason of having been of counsel for one of the parties and in lieu of an election to elect a special judge, the parties to the above mentioned matter by their respective attorneys agree that A. R. Museller be and he hereby is agreed upon as special judge to try the issues in the above entitled matter with like jurisdiction as the regular judge in such cases. And it is agreed his power as such special judge continue from term to term until the appeals in this case are perfected if any be taken.

JOHN EMBRY,
Attorney for John Kenney.
H. P. WHITE,
Attorney for Laban Miles.

Endorsed: Filed this the 1st day of March, 1915, Thos. Leahy, Clerk of the Dist. Court, by Eula B. Foley, Deputy Clerk.

53 Be it known that thereafter, towit, on March 8th, 1915, the Hon. A. R. Museller accepted such office as special judge in said cause, and took, subscribed and filed in said court his oath of office, which, together with all the indorsements thereon, was and is in the words and figures following, towit:

54 STATE OF OKLAHOMA,
County of Osage, ss:

In the District Court of Osage County, Oklahoma.

No. 2372.

In the Matter of the Estate of LAH-TAH-SAH, Osage Allottee #256, Deceased, on Appeal from the County Court to the District Court.

Oath of Special Judge.

I, A. R. Museller, do solemnly swear that I will support, obey, and defend the Constitution of the United States, and the Constitu-

tion of the State of Oklahoma, and will discharge the duties of my office as Special Judge in the above entitled matter with fidelity; that I have not paid, or contributed, either directly or indirectly, any money or other valuable thing, to procure my nomination, election or appointment; that I have not, knowingly, violated any election law of the State, or procured it to be done by others in my behalf; that I will not, knowingly, receive, directly or indirectly, any money or other valuable thing, for the performance or non-performance of any act or duty pertaining to my office, other than the compensation allowed by law, and I further swear that I will not receive, use or travel upon any free pass or on free transportation during my term of office.

A. R. MUSELLER.

Subscribed and sworn to before me this 8th day of March, 1915.
[SEAL.] THOS. LEAHY,
Court Clerk.
By EULA B. FOLEY, *Deputy.*

Endorsed: Filed Mar. 8, 1915. Thos. Leahy, Court Clerk.

55 Be it known that thereafter, to wit, on said March 8, 1915 the said motion to dismiss said appeal was argued by counsel and duly considered by the court, and was by the court overruled, to which ruling the said Laban Miles duly excepted and exceptions were allowed, which said ruling, exceptions and journal entry thereof, with all indorsements thereon was and is in the words and figures following, to wit:

56 STATE OF OKLAHOMA,
County of Osage, ss:

In the District Court of Osage County, Oklahoma.

No. 2372.

In the Matter of the Estate of LAH-TAH-SAH, Osage Allottee #256, Deceased, on Appeal from the County Court to the District Court.

Journal Entry Overruling Motion to Dismiss the Appeal.

Now on this 8th day of March, 1915, the same being a regular judicial day of the March, 1915, term of said court the above entitled cause comes on for hearing before A. R. Museller, Special Judge, upon a motion of Laban Miles, appellee, to dismiss the appeal, appellant, John Kenney, appearing by John Embry, his attorney, and appelle-, Laban Miles, appearing in his own proper person and by H. P. White, his attorney, and the court having heard the argument of counsel and being fully advised in the premises finds that the said motion to dismiss the appeal should be overruled to which finding of the court said Laban Miles objects and excepts, which objections

and exceptions are by the court allowed. It is therefore ordered, adjudged and decreed by the court that the motion of said Laban Miles, appelle-, to dismiss the appeal be and the same hereby is by the court overruled to which ruling of the court said Laban Miles objects and excepts, which objections and exceptions are by the court allowed.

By agreement of the parties and their respective counsel it is further ordered by the court that further hearing in the above entitled matter be adjourned to April 2nd, 1915.

A. R. MUSELLER,
Special Judge.

57 O. K.
H. P. WHITE,
Attorney for Laban Miles.
JOHN EMBRY,
Attorney for John Kenney.

Endorsed on back as follows: Filed March 8, 1915. Thos. Leahy, County Clerk, by Eula B. Foley, Deputy. Rec. Journ. 7, page 408.

58 Be it known that thereafter, to wit, on April 2nd, 1915, the above entitled cause on appeal, came on for hearing in the district court of Osage County, Oklahoma, before the Hon. A. R. Museller, special judge, and upon consideration of the demurrer of the said John Kenny to the plea of res adjudicata of the said Laban Miles, and after argument of the counsel and upon consideration of the court, the court overruled said demurrer, to which ruling the said John Kenney duly excepted.

And further, upon consideration by the court of the motion of the said Laban Miles, to strike certain designated paragraphs from the answer of the said John Kenny, the same was duly argued by counsel and considered by the court and the following proceedings and exceptions, as more fully set out in the journal entry herein, were had and taken, to wit:

59 In the District Court of Osage County, Oklahoma, Honorable A. R. Museller, Special Judge, Presiding.

Case No. 2372.

In the Matter of the Estate of LAH-TAH-SAH, Deceased, Osage Allottee No. 256, Deceased.

On Appeal from the County Court of Osage County.

Now on this April 2, 1915, the same being a judicial day of the regular March, 1915, term of said court, Special Judge Honorable A. R. Museller, presiding, the above entitled matter came on for hearing upon the demurrer of the Appellant, John Kenney, to the plea of Res adjudicata of the said Laban Miles, and after due argument by Counsel, and consideration thereof by the Court, the Court

overrules the demurrer, to which ruling, the said John Kenney excepts.

Thereafter, and on the same day, the said matter came on for hearing in said court, the said Special Judge, presiding, upon the motion of the said Laban Miles, as appears in the record, to strike from the answer of the said John Kenney, certain of the designated paragraphs of such answer, and after argument by counsel and consideration thereof by the court, the Court sustains the motion of Laban Miles to strike paragraph 2, and also sustains as to Paragraph 3-*a*, paragraph 3-*b*, and paragraph 3-*c*, and the said John Kenney excepts to such ruling; and the said John Kenney specially excepts to the ruling, striking out the second section referred to as the second section; and the said John Kenney specially excepts to the ruling of the Court in striking out paragraph No. 2, of said answer; and John Kenney specially excepts to the ruling of the Court, striking out Paragraph 3-*a* of said answer; and John Kenney specially excepts to the ruling of the Court in striking out paragraph 3-*b* of said answer; and John Kenney specially excepts to the ruling of the Court in striking out Paragraph 3-*c* of said answer.

60 Be it known that thereafter, on-to-wit, April 2nd, 1915, the said cause coming on for trial, in said District Court, before A. R. Museller, special judge, as aforesaid, the said Appellant, John Kenny, being present in person, and by his Attorney, John Embry, and the said Laban Miles being present in person and by his attorney, H. P. White, the jury is waived and the cause is tried to the court; whereupon, on the trial of said cause the following testimony was introduced and proceedings had, and exceptions taken, to wit:

61 Witnesses for Laban Miles, after being duly sworn testify as follows, to-wit:

Direct examination.

Thos. Leahy (by H. P. White):

Q. You may state your name?
A. Thomas Leahy.
Q. What official position do you occupy, if any?
A. Court Clerk of Osage County, Oklahoma.
Q. Prior to being elected as Court Clerk, what official position did you occupy, if any?
A. Clerk of the District Court of Osage County.
Q. And how long were you Clerk of the District Court?
A. About seven years.
Q. Since statehood?
A. Since statehood, yes sir.
Q. You may examine the instrument shown you, marked Laban Miles' Exhibit 1, and state whether or not that is a file belonging to your office?
A. Yes sir, it is.
Q. By Appellee: Laban Miles offers in evidence, the instrument marked Laban Miles' Exhibit 1, identified by the witness, same being

he petition in the case of Laban Miles, plaintiff, vs. John Kenney, efendant, Case No. 1896.

By Appellant: To which said John Kenney objects, for the reason hat it purports to be a pleading in a purported action of the District Court of Osage County, pertaining to the restricted lands of the said Lah-tah-sah, Deceased, and the said Lah-tah-sah was non-competent Osage Indian, and a member of the Osage Tribe of Indians of Oklahoma, who had not received a certificate of competency at or before her death, and the said proceeding in partition in
32 which said offered exhibit was a part, was never approved by the Secretary of the Interior, and the offering of the writ-ng is incompetent, irrelevant, and immaterial.

By the Court: Objection overruled.

By Appellant: Exception; John Kenney further objects to Exhibit 1, as incompetent to prove the truth of any of the statements herein contained.

By the Court: Objection overruled.

By Appellant: Exception.

Q. You may examine the instrument marked Laban Miles' Exhibit No. 2, and state whether or not that is a file belonging to your office?

A. It is.

Q. By Appellee: Laban Miles now offers in evidence the instrument marked Laban Miles' Exhibit 2.

By Appellant: Objected to by John Kenney, for the same reason as to the objection to Exhibit 1.

By the Court: Overruled.

By Appellant: Exception.

Q. You may examine the instrument marked Laban Miles' Exhibit 3, and state whether or not that is a file belonging to the records of your office?

A. It is.

Q. Laban Miles now offers in evidence, the instrument marked Laban Miles' Exhibit 3, same being a Reply to the Answer and cross petition of the Defendant, in the *same* of Laban Miles vs. John Kenney No. 1896.

By Appellant: To this offer, John Kenney objects for the same reason hereinbefore stated to Exhibit No. 1.

By the Court: Overruled.

By Appellant: Exception.

Q. You may examine the instrument marked Laban Miles' Exhibit 4 and state whether or not that is an instrument that belongs to and is a part of the files of your office?

63 A. It is.

Q. State whether or not it has been recorded in the journals of your office?

A. Yes sir, recorded in Journal 5, page 326.

By Appellee: Laban Miles now offers in evidence the instrument marked Laban Miles' Exhibit 4, identified by the witness, same being a journal entry and judgment in the case of Laban Miles plaintiff vs. John Kenney, defendant, No. 1896.

By Appellant: To which John Kenney objects for the reason that the District Court rendering the judgment was without jurisdiction to hear or determine the same, or to render any judgment therein, the lands therein described being the restricted lands allotted to the said Lah-tah-sah, deceased, and the said Lah-tah-sah, deceased, being an Osage Indian, a member of the Osage Tribe of Indians in Oklahoma, who had not received a certificate of competency; the said John Kenney further objects to the testimony offered for the reason that the said Laban Miles and the said John Kenney, and the said Lah-tah-sah, deceased, were all full blood Osage Indians, members of the Osage Tribe of Indians in Oklahoma, none of whom has at any time received a certificate of competency, and the lands described in the judgment offered, were the allotments made to said Lah-tah-sah as such incompetent full blood Indian, and were restricted lands, and lands that the said Lah-tah-sah at no time had the right or the power to alienate or encumber, and the said judgment offered was never approved by the Secretary of the Interior, and no partition or proceeding under such judgment was ever approved by the Secretary of the Interior; and John Kenney objects for the further reason that the Court trying such cause, had no jurisdiction to try and determine the adverse claims of heirs to such property, or to the estate of the said Lah-tah-sah, deceased; and the said John Kenney fur-

64 ther objects for the reason that at the time of the institution of said suit in which said judgment was rendered, and during the pendency of said suit, and at the time of the rendition of such judgment, this action and proceeding in administration of the Estate of the said Lah-tah-sah, deceased, was pending a proceeding in the County Court of Osage County, and the sole and only jurisdiction over such lands or to determine such heirships, was at that time vested in the County Court of Osage County, in such administration proceeding, and the testimony offered is incompetent, irrelevant, and immaterial; and further, the testimony offered is incompetent to prove any of the allegations or statements therein contained.

By the Court: Objection overruled.

By Appellant: John Kenney excepts.

Q. Now, the instrument you have just examined, marked Laban Miles' Exhibit 4, state whether or not that is the original journal entry signed by the Trial Judge in the case of Laban Miles vs. John Kenney, No. 1896?

A. It is.

Q. You may examine the book I now hand you and state what it is?

A. It is the judgment docket in the District Court, called the new No. 1 Judgment Docket.

Q. State whether or not that judgment in the case of Laban Miles vs. John Kenney, No. 1896, is entered on that Book of judgment?

A. It is.
Q. At what place?
A. 142.

By Appellee: Laban Miles now offers in evidence at page 142, of the Judgment Docket, new No. 1, of the District Court of Osage County, Oklahoma, referred to herein as Ex. 15.

By Appellant: To which the said John Kenney objects for the same reason as given to No. 4.

65 By the Court: Overruled.
By Appellant: Exception.

Q. As part of the records of your office, do you keep a book known as a journal?
A. Yes sir.
Q. And what do you record in such journal?
A. Orders and Journal entries.
Q. Journal entries of judgment?
A. Yes sir, and the minutes of the Clerk, also court proceedings.

By Appellee: Laban Miles now offers in evidence the page of the entry beginning on page 326, in Volume 5, of the Journal of the Office of the Court Clerk, same being the recorded journal entry of judgment in the case of Laban Miles, vs. John Kenney, No. 1896.

By Appellant: John Kenney objects to the offer for the same reason as objection made to Exhibit No. 4, it being understood that the offer is the record entered on the journal of the court of Exhibit No. 4.
By the Court: Overruled.
By Appellant: Exception.

Q. You may examine the instrument now shown you marked Laban Miles' Exhibit 5, and state whether or not that is a part of the files and records of your office?
A. It is.

Q. Laban Miles now offers in evidence instrument marked Laban Miles' Exhibit 5, same being the motion for a new trial on behalf of John Kenney in the case of Laban Miles vs. John Kenney, No. 1896.

By Appellant: Objected to by John Kenney, as incompetent irrelevant and immaterial.
By the Court: Overruled.
By Appellant: Exception.

66 Q. I ask you to examine the instrument now shown you marked Laban Miles' Exhibit 6, and state whether or not it is a part of the records and files of your office?
A. It is.

Q. By Appellee: Laban Miles now offers in evidence, Laban Miles' Exhibit 6, same being Journal entry overruling motion for new trial in the case of Laban Miles vs. John Kenney, No. 1896.

By Appellant: To which John Kenney objects for the reason it is incompetent, irrelevant and immaterial.
By the Court: Overruled.
By Appellant: Exception.

Q. You may examine the instrument marked Laban Miles' exhibit 6, again, and state whether or not that is the original signed journal entry, overruling motion for new trial?
A. It is.
Q. State whether or not that is recorded, and if so, where?
A. Yes sir, Journal 5, at page 455.
Q. You may examine the instrument now shown you, marked Laban Miles' Exhibit 7, and state whether or not that is a part of the files and records of your office?
A. Yes sir, it is.

By Appellee: Laban Miles now offers in evidence the instrument marked Laban Miles' Exhibit 7, identified by the witness, the same being stipulation and agreement for the appointment of R. B. Boone, Special Judge, in the case of Laban Miles vs. John Kenney, No. 1896.

67 By Appellant: To which John Kenney objects as incompetent, irrelevant, and immaterial.
By the Court: Overruled.
By Appellant: Exception.

Q. You may examine the instrument now shown you marked Laban Miles' Exhibit 8, and state whether or not it is a part of the records of the files of your office?
A. It is.

By Appellee: Laban Miles now offers said Exhibit 8, identified by the witness, in evidence.

By Appellant: To which John Kenney objects, for the reason, it is incompetent, irrelevant, and immaterial.
By the Court: Overruled.
By Appellant: Exception.

By Appellant: John Kenney admits that R. B. Boone subscribed and took the oath of office before he attempted to act as Special Judge in Case No. 1896.

68 Cross-examination.

(By John Embry:)

Q. Mr. Leahy, that book you have, and these books and records to which your testimony refers, are all books and records of the District Court of Osage County, Oklahoma?
A. Yes sir.
Q. And none of them are records or books of the County Court of Osage County?
A. No sir.

Q. Or of the probate record of Oklahoma Territory of Osage County?

A. No sir.

Q. Have you any records of proceedings, or entry on any records, papers, or proceedings, showing that the Secretary of the Interior approved this judgment, or approved any proceedings in the case?

A. No sir, I have not.

Q. Have you any records or proceedings, papers, or entry on any records, showing or tending to show that the Secretary of the Interior approved or took any action with respect to any partition or sale, or the judgment, or any other proceedings in this case?

A. I don't think I have, I don't remember of any.

Q. Well, your attention has been called to this a number of times, hasn't it?

A. No sir, I looked this morning, but I don't find any records of that kind, I looked at the Appearance Docket this morning.

69 Redirect examination.

(By H. P. White:)

Q. You may examine the instruments now shown you, marked Laban Miles' Exhibits 9, 10, 11, 12, 13 and 14, and state whether or not they and each of them are instruments that contained a part of the records and files of your office?

A. Yes sir.

By Appellee: Laban Miles now offers in evidence the instrument marked Laban Miles Exhibit 9.

By Appellant: To which John Kenney objects as incompetent, irrelevant, and immaterial, and not approved by the Secretary of the Interior.

By the Court: Overruled.

By Appellant: Exception.

By Appellee: We now offer in evidence, instrument marked Laban Miles' Exhibit 10, identified by the witness.

By Appellant: Objected to as incompetent, irrelevant, and immaterial, and not approved by the Secretary of the Interior.

By the Court: Overruled.

By Appellant: Exception.

By Appellee: We now offer in evidence, instrument marked Laban Miles' Exhibit 11, identified by the witness.

By Appellant: Same objection.

By the Court: Overruled.

By Appellant: Exception.

By Appellee: Laban Miles now offers in evidence instrument marked Laban Miles' Exhibit 12.

By Appellant: John Kenney objects as incompetent, irrelevant, and immaterial, and not approved by the Secretary of the Interior.

By the Court: Overruled.
70 By Appellant: Exception.

By Appellee: Laban Miles now offers in evidence, instrument marked Laban Miles' Exhibit 13, identified by the witness.

By Appellant: To which John Kenney objects as incompetent, irrelevant, and immaterial, and not approved by the Secretary of the Interior.

By the Court: Overruled.

By Appellant: Exception.

By Appellee: Laban Miles now offers in evidence, instrument marked Laban Miles' Exhibit 14, identified by the witness.

By Appellant: To which John Kenney objects as incompetent, irrelevant, and immaterial, and not approved by the Secretary of the Interior.

By the Court: Overruled.

By Appellant: Exception.

Q. I will ask you to examine instrument marked Laban Miles' Exhibit 11, and state whether or not that has been recorded and if so, where?

A. Journal 6, there is two pages on this and I am not certain which one is right, one is 28, and one 29.

Q. Well, I suppose it begins on page 28, and ends on page 29; it has been recorded in the Journal?

A. Yes sir.

(Leban Miles rests.)

(Witnesses for Appellant, after being duly sworn, testify as follows:

Direct examination.

71 John Kenny (by John Embry):

Q. State your name to the Court?

A. John Kenny.

Q. You are the John Kenny who appeared in this case from the County Court, are you?

A. Yes sir.

Q. And you are the son of Lah-tah-sah, deceased?

A. Yes sir.

Q. You are a full blood Osage Indian, are you John?

A. Yes sir.

Q. Have you ever received a certificate of competency?

A. No sir.

By Appellee: Objected to as incompetent, irrelevant and immaterial, and is not the best evidence.

By Appellant: I think he can swear whether he received a certificate or not.

By the Court: Overruled.

By Appellant: Exception.

Q. Was your mother, Lah-tah-sah, an Osage Indian, John?
A. Yes sir.
Q. Was she a full blood?
A. Yes sir.
Q. Dis she ever received a certificate or competency?
A. No, I don't believe she did.

By Appellee: Objected to as incompetent, irrelevant and immaterial, and not the best evidence.
By the Court: Not the best evidence, but I will let it go in, I will permit that as to the competency or incompetency of the deceased, Lah-tah-sah.
By Appellee: Exception.

Q. John, do you know Laban Miles?
A. Yes sir, I do.
72 Q. How long have you known him?
A. Well, I have known him since I can remember.
Q. John, do you know Eu-lah-wah-tah, a brother-in-law of Laban Miles?
A. Yes.

By Appellee: Objected to as incompetent, irrelevant and immaterial.
By the Court: Objection overruled as introduced.
By Appellee: Exception.

Q. Did you receive a horse given away by Eu-lah-wah-tah, given away in honor of Laban Miles and your mother?

By Appellee: Objected to as incompetent, irrelevant, and immaterial, and res adjudicata, having been adjudicated in the case of Laban Miles vs. John Kenney.
By the Court: Sustained.
By Appellant: Exception.

Q. Did you receive any presents at any time on account of any marriage between your mother and Laban Miles?
A. No sir.

By Appellee: Objected to for the reason that the same is incompetent, irrelevant and immaterial, and res adjudicata, having been determined in the judgment and pleaded in this case as res adjudicata.
By the Court: Sustained.
By Appellant: Exception.

Q. Did you at any time know of any presents, or see any presents given of any kind in honor of any marriage of any kind?

73 (By Appellee: Objected to as incompetent, irrelevant, and immaterial, having been determined in the suit heretofore between the witness and Laban Miles.
By the Court: Sustained.
By Appellant: Exception.

Q. Did you know of any feast in honor of any marriage between your mother and Laban Miles?

By Appellee: Objected to as incompetent, irrelevant, and immaterial, res adjudicata, as plead in the judgment of res adjudicata.
By the Court: Sustained.
By Appellant: Exception.

Q. John, when did your mother die?
A. I remember she died in August, 1908.
Q. Did she have any children living besides yourself at that time?
A. No sir.
Q. How long prior to that time had you been her only child?

By Appellee: Objected to as incompetent, irrelevant, and immaterial, and as res adjudicata.
By the Court: Sustained.
By Appellant: Exception.

Q. Was her mother living along in September, 1907, and from that time up until your mother's death?

By Appellee: Objected to as incompetent, irrelevant, and immaterial, and as res adjudicata.
By the Court: What is your object?
By Appellant: The object is to show that at the time it was claimed that there was a marriage, that the mother of Lah-tah-sah was living, and that certain brothers and sisters of Lah-tah-sah were living, and that according to the Osage Indian custom by which marriages might be consummated by people under the situation and circumstances of Laban Miles and Lah-tah-sah, it was necessary that messengers first be sent to the family of the woman, and
74 that presents and horses be given to the family and relatives, in purchase of the woman; it is for the purpose of controverting the issue of any marriage between Laban Miles and Lah-tah-sah.
By the Court: Objection sustained.
By Appellant: Exception.
By Appellant: Comes now John Kenney, and offers to show, and this witness will so testify, if permitted by the Court, that he is of the age of thirty-six years, that he is an Osage Indian of the full blood, now living, and has during his whole life, lived in the Osage Reservation of Oklahoma, and has learned and is well acquainted with the Osage Indian customs or marriage, and was, during the years 1907 and 1908, acquainted with the rule of marriage among the Osages according to Indian custom, and that he was at that time, during those years, acquainted with Laban Miles, and he knows that Laban Miles had been married prior to the year 1907, and that he knows that Lah-tah-sah, in 1907, and 1908, was a widow, having been previously married, and that persons of their age and situation and circumstances, to marry according to the Indian custom, is was necessary and it was then the custom that the man send messengers to the widow with his offer of marriage accompanied by gifts of horses and blankets, and while the offer of marriage is made direct

to the widow, she, wishing to conform as nearly as possible to the form of the marriage between persons that have not been previously married, referred such messengers and the gifts to her parents, if living, and to her nearest relatives, and let them decide for her; these parents and relatives confer upon the proposition, and if they are satisfied with the negotiations, they convey to the messengers
75 their consent, and by them send for the man; when the man arrives at the house of the relatives of the woman, they offer him a seat beside her, and the marriage is consummated without further ceremony; and further this woman will testify that no such proceeding or ceremony *were* ever had or performed in respect to any pretended marriage between Laban Miles and his mother, and that no gifts were ever offered, and that this woman was not informed and does not know of any marriage between the parties.

By Appellee: To which offer, Laban Miles objects and excepts, for the reason that the question of marriage of Laban Miles and Lah-tah-sah, deceased, has been adjudicated in the case of Laban Miles, plaintiff, vs. John Kenney, defendant, No. 1896, and the judgment thereon has been pleaded as res adjudicata in this action, and for the further reason that if the witness should so testify, that such testimony, would in the main be false for the reason that the marriage of Osage Indians under the Osage Indian custom, of the ages of Laban Miles and Lah-tah-sah, respectively, is not accomplished in the manner indicated in the offer, is not now the custom, and has never been the custom, and for these reasons, if the witness would so testify, the testimony would be false.

By the Court: Objection sustained, for the reason that any testimony which goes to the question of whether Laban Miles was the husband of Lah-tah-sah at the time of her death, has already been determined, and this court cannot take judicial notice of the same.

By Appellant: Exception.

76 Cross-examination.

(By H. P. White:)

Q. How old are you, John?
A. I think I must be thirty-five.
Q. You talk English, don't you?
A. Yes.
Q. You can testify without the aid of an Interpreter?
A. Yes sir.
Q. You can write, can't you?
A. How is that?
Q. Can you write? Can you write your name, and write letters?
A. Yes.
Q. And read?
A. Yes sir.
Q. In fact, you have a pretty good education, hav-n't you, John?
A. Well, pretty fair.
Q. Much better than the average Osage Indian?

By Appellant: Object to that comparison, as the witness is incompetent.

By the Court: Sustained.

77 Direct examination — John McGuire.

(By John Embry):

Q. State your name to the Court?

A. John H. McGuire.

Q. Where do you live, Mr. McGuire?

A. Pawhuska.

Q. How long have you lived here in Pawhuska?

A. About seventeen years.

Q. Did you, during the years 1907 and 1908, know Laban Miles?

A. Yes sir.

Q. And the Indian Woman, Lah-tah-sah, the deceased, John Kenney's mother?

A. I just knew her, yes sir, but I never was acquainted with her.

Q. I will ask you if at any time along in the summer of 1908 you had any conversation with Laban Miles about this woman?

By Appellee: Objected to as incompetent, irrelevant, and immaterial.

By the Court: Overruled.

By Appellee: Exception.

A. I don't remember exactly what year it was, but I think that was about the time.

Q. Do you know when she died, or was reported to have died?

A. Why no, I don't really know, I didn't pay any attention, I think though about shortly after I had this talk with Laban.

Q. Well, what I mean to say is, did you at the time, learn of the report of her death?

A. Yes, I heard about it.

Q. Now, this conversation to which you refer with Laban Miles, was how long before you heard of Lah-tah-sah's death?

A. I don't remember exactly how long it was, only a short time.

Q. Where did this conversation occur?

A. As well as I remember, it was down here in front of
78 Patterson's Drug Store or about there.

Q. What was that conversation, and what statement, if any, did Laban Miles make as to whether or not he was married to Lah-tah-sah?

By Appellee: Objected to as incompetent, irrelevant, and immaterial and the question of the marriage of Laban Miles and Lah-tah-sah, is res adjudicata.

By the Court: Sustained.

By Appellant: Exception. John Kenney now offers, and this witness will so testify, if permitted by the Court, that a short time before the death of the deceased, Lah-tah-sah, he knew the Indian, Laban Miles, herein, and Lah-tah-sah, and that at the time and place

just stated, here in the City of Pawhuska, a short time before Lah-tah-sah's death, he had a conversation with Laban Miles, in which he asked Laban Miles if he had married the woman, Lah-tah-sah, and Laban Miles stated that he had not.

By Appellee: To which offer Laban Miles objects to the same as incompetent, irrelevant, and immaterial, and concerning matters res adjudicata, the question of the marriage of Laban Miles and Lah-tah-sah, the decedent, having been fully adjudicated in the judgment rendered by the District Court of Osage County, Oklahoma, in the case of Laban Miles vs. John Kenney, pleaded as res adjudicata, in this action.

By the Court: Sustained.

By Appellant: Exception.

79 Cross-examination.

(By H. P. White):

Q. John, you testified in the case of Laban Miles, vs. John Kenny in the District Court?

A. What is the question?

Q. You were a witness in the case of Laban Miles against John Kenny, in the District Court?

A. I was subpœn-ed there, I don't know whether I answered any questions or not, I don't remember.

Q. You don't remember.

A. They subpœn-ed me, but I don't think they called me at the time.

Q. You were subpœn-ed by John Kenny as a witness on that case?

A. I don't know by whom, but I was subpœn-ed in the case.

By Appellant: John Kenny offers to prove by the witness, Tom-pah-pe, and said witness will so testify if permitted by the court, that she is the mother of Lah-tah-sah, the deceased, and was living in Osage County, Oklahoma, up until the death of Lah-tah-sah, and that she did not receive messengers, and did not receive presents, and was not advised of any marriage between Lah-tah-sah and Laban Miles, and that she did not consent to any marriage between Laban Miles and Lah-tah-sah.

By Appellee: To which Laban Miles objects for the reason same is incompetent, irrelevant and immaterial, the matters concerning which the testimony is offered being res adjudicata, having been fully adjudicated in the case of Laban Miles vs. John Kenny, No. 1896, pleaded as res adjudicata in this case.

By the Court: Sustained.

By Appellant: Exception.

80 By Appellant: John Kenny offers to prove by the witness, Grah-tah-su-ah, and such witness will so testify if permitted by the Court, that she is a sister of Lah-tah-sah, and is living and has lived in the Osage Indian Reservation and in Osage County for a great number of years, and that she did not receive messengers nor

presents, nor was she advised of any marriage between Laban Miles and Lah-tah-sah, and that she did not consent to such marriage.

By Appellee: Same Objection.

By the Court: Sustained.

By Appellant: Exception.

By Appellant: John Kenny, offers to prove by the witness, Pun-q-tah, and such witness will so testify if permitted by the Court, that she is a sister of Lah-tah-sah, and that she was not advised of any marriage between Lah-tah-sah and Laban Miles, and did not receive messengers nor presents on that account, and did not consent to any such marriage.

By Appellee: Same Objection.

By the Court: Sustained.

By Appellant: John Kenny excepts.

81 Direct examination — Mr. Woodward.

(By John Embry:)

Q. State your name?

A. A. T. Woodward.

Q. What is your business, Mr. Woodward?

A. Attorney for the Agency.

Q. The Osage Indian Agency?

A. Yes sir.

Q. That is an office now in the Agency and a part of the Agent's Force, is it not?

A. Yes sir.

Q. What are the duties of your office?

A. Of attending the hearings in the Probate Court and looking after the accounts of administrators and guardians, and certificates of competency, and generally any legal work in connection with the Agency.

Q. In looking after the certificates of competency, do you keep a record, and is that record kept for the purpose of showing, and does it show the names of the Indians for whom certificates of competency have been issued?

A. Yes sir.

Q. Is that record kept for the purpose of showing the names of all Osage Indians to whom certificates have been issued?

A. Yes sir.

Q. I will ask you if Laban Miles is a member of the Osage Tribe and of the full blood?

By Appellee: It is admitted that Laban Miles is a member of the Osage Tribe of Indians, and to whom no certificate of competency has been issued.

Q. And of the full blood? On what roll does Laban Miles appear?

A. On the full blood roll.

82 By Appellee: It is further admitted by Laban Miles that Lah-tah-sah, deceased, was a member of the Osage Tribe of Indians, to whom no certificate of competency was ever issued.

Q. The witness, John Kenny, you saw him here, didn't you?
A. I don't know whether I know John Kenny or not.
Q. I will ask you if the record shows any certificate of competency issued to him?
A. No certificate has been issued to John Kenny, no.
Q. None to Laban Miles and none to Lah-tah-sah?
A. No sir.
Q. Of what blood does the roll show Lah-tah-sah was?
A. Laban Miles, John Kenny, and Lah-tah-sah, all appear on the full-blood roll.
Q. I call your attention to this writing which is marked Laban Miles' Exhibit 4, purported to be a judgment rendered in the action therein described, at a time begun on the 25th day of April, 1913, and concluded some days later by Special Judge, R. B. Boone, pertaining to the lands and allotments referred to in the testimony of Thos. Leahy, and I will ask you if you have any records in your office showing that the Secretary of the Interior has approved that judgment, or any proceedings under it at any time?

By Appellee: Objected to for the reason that the record itself is the best evidence.
By the Court: Objection Sustained.
By Appellant: Exception.

Q. I will ask you if you or your office at any time had been advised of any partition of these lands allotted to Lah-tah-sah had been approved by the Secretary of the Interior?

By Appellee: Objected to as incompetent, irrelevant and immaterial, and not the best evidence.
By the Court: Sustained.
By Appellant: Exception.

83 Cross-examination.

(By H. P. White:)

Q. The roll of the membership of the Osage Tribe doesn't pretend to set forth the degree of the blood of the allottees, does it?
A. No, the roll is divided into what they call a full blood and mixed blood roll, but does not specify the degree of blood of each individual.
Q. And the fact that a name might appear on the full blood roll would be no evidence that that individual was a full blood.
A. It would be evidence of the fact that that allottee was considered a full blood.
Q. Well, as a matter of fact, do you know whether or not Laban Miles is a full blood?
A. No, I do not know that he is really a full blood.
Q. Do you know whether or not the name of Paul Albert appears on the full blood roll?
A. Yes, it does.
Q. And don't you know as a matter of fact that Paul Albert isn't a full-blood Osage?

A. No, I don't know that as a matter of fact.
Q. Don't you know that he is about one-fourth colored blood?
A. No, I don't know that as a matter of fact.
Q. Did you know his mother, Julia Whitetail?
A. I am not sure, I don't recall her.
Q. Did you know the Indian they called Aunt Lucy?

By Appellant: Objected to as not proper cross examination.
By the Court: Sustained.

Q. Do you know whether or not Aunt Lucy as we called her, was on the full blood roll?
A. Yes.

By Appellant: Objected to as not proper cross examination.
By the Court: Overruled.

84 Q. And don't you know that Aunt Lucy, although she was enrolled on the full blood roll, had very kinky hair, as kinky as the full blood negro?

By Appellant: Objected to as not proper cross examination.
By the Court: Sustained.

That each and all of said foregoing witnesses were duly sworn, before testifying, to testify to the truth, the whole truth, and nothing but the truth in the trial of said case.

By Appellant: John Kenny offers in evidence and asks the Stenographer to mark as Exhibit A, the entry on page 282, of the Allotment Deed Record, No. 1, Osage County, Oklahoma, formerly in the office of the Register of Deeds of Osage County, Oklahoma, and now in the office of the County Clerk and records of that office, being the Patent issued to Lah-tah-sah, and part of the land mentioned in Laban Miles' Exhibit No. 4.

By the Court: It may be received in evidence.

By Appellant: Also, John Kenny offers his exhibit B, and asks the Stenographer to so mark it, being page 247, of Homestead Deed Records of Osage County, formerly the records of the office of the Register of Deeds of said County, and now of the office of County Clerk of said County, being the Deed of Allotment of Lah-tah-sah, Osage Allottee No. 256.

By the Court: May be received.

By Appellant: It is agreed that Laban Miles is now fifty-six years old, and that Lah-tah-sah, deceased, was approximately fifty years old in 1909.

85 STATE OF OKLAHOMA,
Osage County, ss:

In the District Court in and for said County and State.

LABAN MILES, Plaintiff,

vs.

JOHN KENNY, Defendant.

Petition.

Comes now the plaintiff and for cause of action against the defendant, alleges and states:

1. That said plaintiff and the said defendant are the sole heirs of Lah-tah-sah, Osage Allottee No. 256, deceased. That by a deed dated September 28, 1908 recorded Mar. 2, 1909, in Book 1, of Homestead Deeds, page 247, in the office of the Register of Deeds for Osage County, Oklahoma, there was conveyed to Lah-tah-sah the following tract of land in Osage County, Oklahoma, towit:

N. W. ¼ of section 26, Township 24 North, Range 4 east of the Indian Meridian, containing 160 acres.

That by a deed dated May 15, 1909, recorded August 10, 1909, in Book 1 of Allotment Deeds, page 282, in the office of the Register of Deeds for Osage County, Oklahoma, there was conveyed to Lah-tah-sah, the following tracts of land in Osage County, Oklahoma, towit:

N. E. ¼ of Section 30, Township 28, Range 9; S. E. ¼ of Section 30, Township 28, Range 9; Lot 3, E. ½ of S. W. ¼ of N. W. ¼, S. E. ¼ of N. W. ¼, N. ½ of S. E. ¼ of Section 4, Township 20, Range 10, all North and East of the Indian Base and Meridian, containing 500.12 acres more or less.

2. That on or about the 19th day of August, 1908, said Lah-tah-sah died intestate, leaving surviving her Laban Miles, hus-
86 band, plaintiff, and John Kenny, an only child, the defendant. That plaintiff and defendant above named are the only heirs at law of said Lah-tah-sah, deceased, and on her death her said estate vested one-half in plaintiff and one-half in defendant. No other person has any interest or lien in, or right to said real estate; and said real estate is capable of being divided.

Wherefore, Plaintiff prays for a partition of said property, and that this court order and decree that the interest of plaintiff therein be an undivided one-half interest and that the interest of defendant John Kenny be an undivided one-half interest; and that partition of the said property be made accordingly, and that the court appoint three commissioners to make partition of said respective shares, and for such other order and relief as may be proper; and that the costs,

attorney fees and expenses which may accrue in this action be apportioned among the parties according to their respective interests.

LABAN MILES, *Plaintiff.*

Witness:
MINERVA MILES.

WHITE & WIDDOWS,
Attorneys for Plaintiff.

Endorsed: Filed this the 28 day of Feb'y 1913. Thos. Leahy, Jr., Clerk of the Dist. Court.

Corrected as per stipulation.
"Laban Miles' Ex. One."

87 In the District Court of Osage County, Oklahoma.

No. 1896.

LABAN MILES, Plaintiff,

vs.

JOHN KENNY, Defendant.

Answer and Cross Petition.

Comes now the defendant and for his answer and cross-petition in the above entitled action, denies each and every material allegation in plaintiff's petition contained, specifically and generally, except such as are herein especially admitted.

2. Defendant admits that Lah-tah-sah died intestate on or about the 19th day of August, 1908. That she was at the time of her death a member of the Osage tribe of Indians and that her allotment number was 256. That she died seized of the following described lands situated in Osage County, Oklahoma, towit: The Northwest quarter of section twenty-six (26), Township twenty-four (24), North, range four (4), East of the Indian Meridian, the Northeast quarter of section thirty (30), township twenty-eight (28), North, Range nine (9), east of the Indian Meridian, the Southeast quarter of section thirty (30) township twenty-eight (28) North, range nine (9) east of the Indian meridian, Lot three (3), the east half of the southwest quarter of the northwest quarter, the southeast quarter of the northwest quarter, the north half of the southeast quarter of section four (4), township twenty (20), North, range ten (10) east of the Indian meridian.

3. Defendant further admits that he is son of the said Lah-tah-sah, deceased, and alleges that he is her sole surviving heir at law, and that the said Lah-tah-sah at the time of her death left no other heirs or persons next of kin to her.

88 4. Defendant further says that he is now in the constructive possession of all of the said described lands and that he

is the sole and absolute owner thereof by reason of having inherited the same from his mother the said Lah-tah-sah and that he is entitled to the immediate, actual and exclusive possession thereof, and of every tract and portion thereof. That the claim of the plaintiff, Laban Miles, as set out in plaintiff's petition, constitutes a cloud on defendant's title.

Wherefore, Defendant prays judgment of the court that plaintiff take nothing by reason of his alleged cause of action, that defendant be adjudged and decreed by the court to be the sole, absolute owner of the said described lands and of every tract and portion thereof, and entitled to the immediate and exclusive possession thereof. That the plaintiff be adjudged and decreed by the court to have no right, title, estate or interest in or to the said described lands or to any part or portion thereof, and that the plaintiff be forever barred and precluded from claiming or asserting any right, title or interest therein or thereto, and that defendant's title be adjudged to be the only sole and exclusive title therein, and that the title in and to the said described lands and every part and portion thereof be quieted in the defendant, and that defendant have his costs herein incurred and have such other and further relief as to the court may seem meet, just and equitable.

HARGIS & CONWELL,
Attorneys for Defendant.

*Neod*rsed: Filed Mar. 11, 1913. Thos. Leahy, Jr., Clerk District Court. By Eula B. Foley, Deputy.

"Laban Miles' Ex. 2."

89 In the District Court of Osage County, Oklahoma.

No. 1896.

LABAN MILES, Plaintiff,

vs.

JOHN KENNY, Defendant.

Reply.

Comes now the above named plaintiff and for reply to the answer and cross-petition filed herein by above named defendant, denies each and every allegation therein contained inconsistent with those contained in petition of plaintiff, and prays for judgment as in his petition herein filed.

LABAN MILES, *Plaintiff.*

WHITE AND WIDDOWS,
Attorneys for Plaintiff.

Endorsed: Filed this the 12th day of March, 1913. Thos Leahy, Jr., Clerk of the Dist. Court. By Eula B. Foley, Deputy Clerk.

"Laban Miles' Ex. 3."

90 In the District Court in and for Osage County, Oklahoma.

No. 1896.

LABAN MILES, Plaintiff,

vs.

JOHN KENNY, Defendant.

Journal Entry.

On the 25th day of April 1913, same being a regular judicial day of the March 1913 term of said court, the above entitled cause came on for hearing in its regular order, pursuant to agreement of the parties, before R. B. Boone, Special Judge agreed upon by the parties. The plaintiff appearing in his own proper person and by White & Widdows, his attorneys, and the defendant appearing in his own proper person and by Hargis & Conwell, his attorneys, and all parties waived trial by jury, and announced ready for trial by the court. And thereupon the plaintiff began the introduction of his testimony and said cause was on trial in said court before said Special Judge, all parties being present in their own proper persons and by their attorneys, as hereinabove set forth, on the 25th, 26th of April 1913, and on the 26th of April the trial was adjourned to the 29th day of April 1913 at noon, at which time said trial was resumed before said Special Judge, all parties being present in their own proper persons and by their attorneys, and continued on trial from noon of April 29th to May 2nd, inclusive, during which said time the plaintiff introduced his testimony and rested and the defendant introduced his testimoney and rested, and thereupon the plaintiff offered his testimony in rebut-al and rested. And the court after examination of the pleadings and hearing the arguments of counsel in behalf of the respective parties, took the case under advisement pursuant to consent and agreement of counsel of the respective parties and stipulation of counsel for both parties filed in said cause; and,

Now on this 31st day of May 1913 after due consideration
91 of all the evidence and the arguments of counsel, and being fully advised in the premises, the Court finds the following facts:

That in September, 1907, the plaintiff, Laban Miles, after having been divorced from his former wife, Wah-shah-she-me-tsa-he, according to Osage Indian custom, entered into an agreement with Lah-tah-sah whereby he and Lah-tah-sah agreed to become man and wife. That both were full blood members of the Osage Indian Tribe and unmarried at the time. That they thereupon assumed the marriage relation and continued to sustain that relation up to the time of Lah-tah-sah's death on August 19th, 1908, a period of eleven months. That the morning after they assumed such relationship, the defendant John Kenny, the son of Lah-tah-sah, by a former

husband, received a horse given away by Hlu-ah-wah-tah, the brother-in-law of plaintiff, Laban Miles, in honor of the marriage of Laban Miles and Lah-tah-sah, in accordance with Osage Indian custom, which horse defendant sold, appropriating the money to his own use. That on said morning other presents were given in accordance with the custom of Osage Indians at the marriage of Indians of the age of Laban Miles and Lah-tah-sah and who had been theretofore married. That a feast was given in honor of said marriage on the morning after Laban Miles brought Lah-tah-sah to his home, but neither Laban Miles nor Lah-tah-sah were at said feast. They Laban Miles and Lah-tah-sah went to the Osage Indian Agent and had themselves enrolled as man and wife, and a trading card was issued to Laban Miles on his own and Lah-tah-sah's quarterly annuities and payments. That Laban Miles and Lah-tah-sah were recognized by the Indians with whom they associated as man and wife until Lah-tah-sah's death. That they were also so recognized during this time by the Osage Indian Agency and the Interior Department. That after assuming said relationship in September 1907, they signed various papers to borrow money as man and wife, and held themselves out as such and were so recognized by those who dealt with them in a business way.

To all of which findings of fact the defendant excepts.

92 *Conclusions of Law.*

That plaintiff, Laban Miles, and Lah-tah-sah, Osage Allottee No. 256, were husband and wife at the time of the death of said Lah-tah-sah; that plaintiff, Laban Miles, is the surviving husband of said Lah-tah-sah, and as such is the owner of an undivided one-half interest in and to the lands described in plaintiff's petition. To all of which the defendant excepts.

The court further finds that Lah-tah-sah, Osage Allottee No. 256, died intestate on or about the 19th day of August, 1908, leaving an estate consisting in part of the lands described in plaintiff's petition.

The court further finds that the plaintiff, Laban Miles, and defendant, John Kenny, above named are the only heirs at law of said Lah-tah-sah, deceased, and as such plaintiff Laban Miles owns an undivided one-half interest, and the defendant John Kenny owns an undivided one-half interest in and to the lands allotted and deeded to said Lah-tah-sah, described in plaintiff's petition, towit:

N. W. ¼ of section 26, Township 24, Range 4, N. E. ¼ of section 30, Township 28, Range 9; S. E. ¼ of Section 30, Township 28, Range 9; Lot 3, E. ½ of S. W. ¼ of N. W. ¼, S. E. ¼ of N. W. ¼, N. ½ of S. E. ¼ of section 4, Township 20, Range 10, all North and East of the Indian Base and Meridian in Osage County, Oklahoma.

The court further finds that no part of the lands described was ever used, occupied or claimed by said Lah-tah-sah, deceased, or any of the parties to this action as a homestead, and that no part of same was the homestead of said Lah-tah-sah, or of any of the parties to

this action. The court further finds that the parties hereto have been unable to agree upon a partition or division of said lands.

It is therefore ordered, adjudged and decreed by the court that the plaintiff, Laban Miles, and the defendant, John Kenny, are the owners in common of the lands described, and their respective interests and ownership therein is as follows:

93 Laban Miles, plaintiff, Osage Allottee No. 507, an undivided one-half.

John Kenny, defendant, Osage Allottee No. 257, an undivided one-half.

and that the shares of the aforesaid parties and their respective interests in the lands above described as above set forth, be and the same are hereby confirmed. It is further ordered, adjudged and decreed by the court that partition of said lands be made accordingly; that W. T. Mosier, J. W. Soderstrom, and W. E. Savage, are hereby appointed commissioners to make partition of said property among the parties according to their respective interests as herein fixed and determined, if such partition can be made without manifest injury. But if such partition cannot be made, the commissioners herein named shall make a valuation and appraisement of the property herein described and make a report of their proceedings to the court.

R. B. BOONE,
Special Judge.

Endorsed: Filed this the 31 day of May, 1913. Thos. Leahy, Jr., Clerk of the Dist. Court.

Recorded Jour. 5, page 326.
"Laban Miles' Ex. 4."

94 In the District Court of Osage County, Oklahoma.

No. —.

LABAN MILES, Plaintiff,

vs.

JOHN KENNY, Defendant.

Motion for a New Trial.

Comes now the defendant and moves the Court to grant a new trial of the above entitled action for the following reasons, towit:

1. Irregularity in the proceedings of the court and prevailing party and the abuse of discretion by which the defendant was prevented from having a fair trial.

2. Misconduct of the court and of the prevailing party.

3. Accident and surprise which the defendant could not have guarded against by the exercise of ordinary prudence.

4. Newly discovered evidence material to the defendant which he could not with reasonable diligence have discovered and produce- at the trial.

5. Error of law occurring at the trial and excepted to by the defendant.

6. Error by the court in the admission of incompetent, irrelevant and immaterial evidence on behalf of the plaintiff, duly excepted to by the defendant.

7. Error by the court in the rejection of competent, relevant and material evidence offered on the defendant's behalf.

Wherefore, Defendant prays that his motion be sustained.

HARGIS & CONWELL,
Attorneys for Defendant.

Endorsed: Filed May 31, 1913. Thos. Leahy, Jr., Clerk District Court.

"Laban Miles' Exhibit 5."

95 In the District Court of Osage County, State of Oklahoma.

No. 1896.

LABAN MILES, Plaintiff,

vs.

JOHN KENNY, Defendant.

Journal Entry Overruling Motion for New Trial.

Now on this 19th day of July, 1913, same being a regular judicial day of the June, 1913, term of said court, this matter came on for further hearing in its regular order before Hon. R. B. Boone, Special Judge, upon defendant's motion for new trial; the plaintiff appearing by his attorneys, White & Widdows, and the defendant appearing by his attorneys, Hargis & Conwell, and Leahy & Macdonald; and the court having heard the argument of counsel for the respective parties and being fully advised in the premises, finds that said motion for a new trial should be overruled.

It is therefore ordered, adjudged and decreed that the defendant's motion for a new trial be and the same hereby is by the court overruled, to the overruling of said motion for a new trial the defendant excepted and excepts, and for good cause shown the defendant is hereby given 120 days in which to make and serve a case-made; the plaintiff is given 20 days thereafter in which to suggest amendments, case made to be settled and signed upon five days' written notice by either party. Defendant is given forty days in which to

file good and sufficient supersedeas bond, to be approved by the clerk of this court, in the sum of $500.00.

R. B. BOONE,
Special Judge.

O. K.

WHITE & WIDDOWS,
Attorneys for Plaintiff.
HARGIS & CONWELL,
Attorneys for Defendant.

Endorsed: Filed this the 5th day of August, 1913. Thos. Leahy, Jr., Clerk of the District Court, by A. B. Cotter, Deputy Clerk.

Recorded Jour. 5, page 455.

"Laban Miles' Ex. 6."

96 In the District Court of Osage County, Oklahoma.

No. 1896.

LABAN MILES, Plaintiff,

vs.

JOHN KENNY, Defendant.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above entitled action, that R. B. Boone, the Special Judge agreed upon by the parties to this action, may continue to act as Special Judge in the above entitled action after the expiration of the present term of court, and at or during any subsequent term of the district court of Osage County, Oklahoma, and to do and perform all things necessary or proper in said matter, and to make any order, ruling, decision or judgment, at any subsequent term, that may be necessary or proper; and the parties hereto hereby waive any and all objections thereto.

Dated this 3rd day of May, 1913.

WHITE & WIDDOWS,
Attorneys for Plaintiff.
HARGIS & CONWELL,
Attorneys for Defendant.

Endorsed: Filed May 3, 1913. Thos. Leahy, Clerk District Court.

"Laban Miles' Ex. 7."

97 In the District Court of Osage County, Oklahoma.

No. 1896.

LABAN MILES, Plaintiff,

vs.

JOHN KENNY, Defendant.

Stipulation.

Now on this 8th day of April, 1913, it is hereby stipulated and agreed by and between the parties to the above entitled cause, by and through their respective attorneys of record that R. B. Boone, Senior, be appointed as Special Judge to try the above entitled cause, the regular trial Judge having requested that a special Judge be agreed upon or elected to try said case for the reason that he had represented one of the parties as counsel in said matter prior to his election to the bench.

WHITE & WIDDOWS,
Attorneys of Record for Laban Miles.
HARGIS & CONWELL,
Attorneys of Record for John Kenny.

Endorsed: Filed Apr. 8, 1913. Thos. Leahy, Jr., Clerk District Court, by Eula B. Foley, Deputy.

"Laban Miles' Ex. 8."

98 In the District Court of Osage County, Oklahoma.

LABAN MILES, Plaintiff,

vs.

JOHN KENNY, Defendant.

Oath of John A. Gardner.

STATE OF OKLAHOMA,
Osage County, ss:

I do solemnly swear that I will truly, honestly, fairly and impartially, to the best of my ability, appraise the land involved in the above entitled action.

JOHN A. GARDNER.

Sworn to and subscribed before me this 8 day of January, 1914.
[SEAL.] THOS. LEAHY, JR.,
Clerk Dist. Court.

My com. exp. —— —, ——.

Endorsed: Filed this 8th day of January, 1914. Thos. Leahy, Jr., Clerk Dist. Court, by A. D. Cotter, Deputy Clerk.

"Laban Miles' Ex. 9."

99 In the District Court of Osage County, Oklahoma.

No. 1896.

LABAN MILES, Plaintiff,

vs.

JOHN KENNY, Defendant.

Oath of Commissioners.

I, W. E. Savage, J. W. Soderstrom and John G. Gardner, Commissioners heretofore appointed by the Court on the 24th day of May, 1913, to make partition in the above entitled cause between the parties thereto according to their respective interests, do solemnly swear that I will support, obey and defend the constitution of the United States, and the constitution of the State of Oklahoma, and will discharge the duties of my office with fidelity, faithfully and impartially, to the best of my ability; that I have not paid or contributed, either directly or indirectly, any money or other valuable thing, to procure my nomination or appointment, except for necessary and proper expenses expressly authorized by law; that I have not, knowingly, violated any election law of the State, or procured it to be done by others in my behalf; that I will not, knowingly, receive, directly or indirectly, any money or other valuable thing, for the performance or non-performance of any act or duty pertaining to my office, other than the compensation allowed by law, and I further swear that I will not receive, use or travel upon any free pass or on free transportation during my term of office.

W. E. SAVAGE,
J. W. SODERSTROM,
Commissioners.

Subscribed and sworn to before me this 8 day of December, 1913.

[SEAL.] THOS. LEAHY, JR.,
Clerk Dist. Court.

Endorsed: Filed this 8th day of January, 1914. Thos. Leahy, Jr., Clerk District Court, by A. B. Cotter, Deputy Clerk.

"Laban Miles' Ex. 10."

100 In the District Court of Osage County, Oklahoma.

LABAN MILES, Plaintiff,

vs.

JOHN KENNY, Defendant.

Comes now W. T. Mosier and shows to the Court that on the 24th day of May, 1913, he was appointed by the Court as one of the commissioners to make partition of the lands involved in the above proceeding. That he hereby resigns from said appointment and asks that his resignation be accepted and someone else appointed in his place.

W. T. MOSIER.

Endorsed: Filed Dec. 24, 1913. Thos. Leahy, Jr., Clerk District Court, by A. B. Cotter, Deputy.

"Laban Miles' Ex. 11."

101 STATE OF OKLAHOMA,
Osage County, ss:

In the District Court in and for Osage County, Oklahoma.

No. 1896.

LABAN MILES, Plaintiff,

vs.

JOHN KENNY, Defendant.

Report of Commissioners.

Comes now the undersigned, W. E. Savage, J. W. Soderstrom, and John A. Gardner, and represent to the court that W. E. Savage and J. W. Soderstrom were on the 24th day of May, 1913, and John G. Gardner was on the 24th day of December, 1913, duly and regularly appointed to make partition between the plaintiffs and said defendants of the lands hereinafter described situated in Osage County, Oklahoma, and herewith submit the following report of their doings under said order and appointment as such commissioners.

That before entering upon the discharge of our duties as such commissioners in partition, we each made and subscribed an oath of office to perform our said duties faithfully and impartially to the best of our ability, said oath being filed in this court in the above entitled cause.

That we thereafter made inspection of and considered said property to be partitioned, and found the same was not susceptible of par-

tition in kind between the plaintiff and defendant without manifest injury, and that after considering and viewing said property with reference to its quantity, location and value, we made the following valuation and appraisement of the same, said property being appraised in separate parcels, tracts and bodies, in such way as to make it saleable and to bring the highest possible market value, that is to say:

N. W. ¼ of section 26, Township 24, Range 4, containing 160 acres	$2,400.00
E. ½ of section 30, Township 28, Range 9, containing 320 acres	960.00
102 Lot 3, E. ½ of S. W. ¼ of N. W. ¼, S. E. ¼ of N. W. ¼ of Section 4, Township 20, Range 10, containing 100.12 acres	$300.00
N. ½ of S. E. ¼ of Section 4, Township 20, Range 10, containing 80 acres	$240.00
All north and east of the Indian Meridian in Osage County, Oklahoma.	
Total	$3,900.00

That all of said appraisement of said above described and valued tracts of lands was made after inspecting the same, and is a fair, reasonable, market value thereof.

Your Commissioners further report that having appraised all the property described in said petition and in the order of the court appointing us as such appraisers, we respectfully return herewith this our report with the request that same be accepted and that we be discharged herefrom.

W. E. SAVAGE,
JOHN A. GARDNER,
J. W. SODERSTROM,
Commissioners.

Subscribed and sworn to before me this 8 day of January, 1914.

[SEAL.] THOS. LEAHY, JR.,
Clerk of the District Court.

Cost Certificate.

STATE OF OKLAHOMA,
Osage County, ss:

We the undersigned Commissioners in partition in the foregoing entitled case, hereby certify that in the performance of our duties as such commissioners in this cause, we incurred the following items of expense, towit:

4 days' time for each Commissioner at $5.00 per day..... $40.00
Livery hire, railroad fare, etc..... $24.00

Total $64.00

which said sum we ask the court to allow us for our said services.

W. E. SAVAGE,
J. W. SODERSTROM,
Commissioners.

Endorsed: Filed this the 8 day of January 1914. Thos. Leahy, Jr., Clerk Dist. Court.

"Laban Miles' Ex. 12."

103 In the District Court in and for Osage County, Oklahoma.

No. 1896.

LABAN MILES, Plaintiff,

vs.

JOHN KENNY, Defendant.

Motion to Accept Report.

Comes now the plaintiff and shows to the Court that the Commissioners appointed by the Court to make partition of the property among the parties according to their respective interests as described and fixed by the judgment of this court rendered on the 24th day of May, 1913, have filed herein their report of their proceedings thereunder, from which it appears that the same is not susceptible of partition in kind among the respective parties without manifest injury, for which reason a valuation and appraisement has been made and returned by said Commissioners.

Wherefore plaintiff moves the Court to accept and confirm the report of said Commissioners and to make an order for the sale of the property therein described and appraised.

LABAN MILES, *Plaintiff,*
By WHITE & WIDDOWS,
His Attorneys.

Endorsed: Filed Jan. 10, 1914. Thos. Leahy, Jr., Clerk District Court, By A. B. Cotter, Deputy.

"Laban Miles' Ex. 13."

104 In the District Court of Osage County, Oklahoma.

No. 1896.

LABAN MILES, Plaintiff,

vs.

JOHN KENNY, Defendant.

Order of Sale.

Now on this 24 day of January, 1914, a regular judicial day of the January 1914 term of said court, it appearing to the court that the Commissioners appointed to make partition of the property herein among the parties according to their respective interests have filed herein their report of their proceedings thereunder, from which it appears that the same is not susceptible of partition in kind among the respective parties without manifest injury; and it further appearing to the Court that said commissioners have made a valuation and appraisement of the property and that the same is a fair, reasonable market value thereof. It further appearing to the court that before commencing on their duties the commissioners herein subscribed to and filed in this court their oath of office as required by law, and that the said commissioners have in all things performed their duties faithfully and impartially, to the best of their ability.

It is therefore ordered, adjudged and decreed that the report of said commissioners be and same hereby is accepted, and confirmed, and said commissioners are hereby discharged from further duty herein.

It is further ordered by the court that the Sheriff of Osage County, Oklahoma, be and he hereby is directed to sell said real estate in the same manner as in sales of real estate on execution; that he cause public notice of the time and place of sale to be given, for at least thirty days before the day of sale, by advertisement in some newspaper printed in Osage County, Oklahoma.

R. B. BOONE,
Special Judge.

105 THOS. LEAHY, JR.,
Clerk of District Court,

[SEAL.] By A. B. COTTER, *Deputy.*

Recorded Jour. 6, pages 228-229.

Endorsed: Filed Jan. 24, 1914. Thos. Leahy, Jr., Clerk District Court. By A. B. Cotter, Deputy.

"Laban Miles' Ex. 14."

106 *Judgment Docket, District Court, — County, Oklahoma.*

Date of Judgment: 1896, May 31-13.
Date of Entry of Judgment: Mar. 12-15.
Judgment Debtor: John Kenny.
Judgment Creditor: Laban Miles.
Am't of Judgment: Partition of Real Estate.

"Laban Miles' Ex. 15."

107 In the District Court in and for Osage County, Oklahoma.

No. 1896.

LABAN MILES, Plaintiff,

vs.

JOHN KENNY, Defendant.

Journal Entry.

On the 25th day of April 1913, same being a regular judicial day of the March 1913 term of said court, the above entitled cause came on for hearing in its regular order, pursuant to agreement of the parties, before R. B. Boone, Special Judge agreed upon by the parties. The plaintiff appearing in his own proper person and by White & Widdows, his attorneys, and the defendant appearing in his own proper person and by Hargis & Conwell, his attorneys, and all parties waived trial by jury, and announced ready for trial by the court. And thereupon the plaintiff began the introduction of his testimony and said cause was on trial in said court before said Special Judge, all parties being present in their own proper persons and by their attorneys, as hereinabove set forth, on the 25th, 26th of April 1913, and on the 26th of April the trial was adjourned to the 29th day of April 1913 at noon, at which time said trial was resumed before said Special Judge, all parties being present in their own proper persons and by their attorneys, and continued on trial from noon of April 29th to May 2nd, inclusive, during which said time the plaintiff introduced his testimony and rested and the defendant introduced his testimonoy and rested, and thereupon the plaintiff offered his testimony in rebut-al and rested. And the court after examination of the pleadings and hearing the arguments of counsel in behalf of the respective parties, took the case under advisement pursuant to consent and agreement of counsel of the respective parties and stipulation of counsel for both parties filed in said cause; and,

Now on this 31st day of May 1913 after due consideration
108 of all the evidence and the arguments of counsel, and being fully advised in the premises, the Court finds the following facts:

That in September, 1907, the plaintiff, Laban Miles, after having been divorced from his former wife, Wah-shah-she-me-tsa-he, according to Osage Indian custom, entered into an agreement with Lah-tah-sah whereby he and Lah-tah-sah agreed to become man and wife. That both were full blood members of the Osage Indian Tribe and unmarried at the time. That they thereupon assumed the marriage relation and continued to sustain that relation up to the time of Lah-tah-sah's death on August 19th, 1908, a period of eleven months. That the morning after they assumed such relationship, the defendant John Kenny, the son of Lah-tah-sah, by a former husband, received a horse given away by Hlu-ah-wah-tah, the brother-in-law of plaintiff, Laban Miles, in honor of the marriage of Laban Miles and Lah-tah-sah, in accordance with Osage Indian custom, which horse defendant sold, appropriating the money to his own use. That on said morning other presents were given in accordance with the custom of Osage Indians at the marriage of Indians of the age of Laban Miles and Lah-tah-sah and who had been theretofore married. That a feast was given in honor of said marriage on the morning after Laban Miles brought Lah-tah-sah to his home, but neither Laban Miles nor Lah-tah-sah were at said feast. They Laban Miles and Lah-tah-sah went to the Osage Indian Agent and had themselves enrolled as man and wife, and a trading card was issued to Laban Miles on his own and Lah-tah-sah's quarterly annuities and payments. That Laban Miles and Lah-tah-sah were recognized by the Indians with whom they associated as man and wife until Lah-tah-sah's death. That they were also so recognized during this time by the Osage Indian Agency and the Interior Department. That after assuming said relationship in September 1907, they signed various papers to borrow money as man and wife, and held themselves out as such and were so recognized by those who dealt with them in a business way.

To all of which findings of fact the defendant excepts.

109 *Conclusions of Law.*

That plaintiff, Laban Miles, and Lah-tah-sah, Osage Allottee No. 256, were husband and wife at the time of the death of said Lah-tah-sah; that plaintiff, Laban Miles, is the surviving husband of said Lah-tah-sah, and as such is the owner of an undivided one-half interest in and to the lands described in plaintiff's petition. To all of which the defendant excepts.

The court further finds that Lah-tah-sah, Osage Allottee No. 256, died intestate on or about the 19th day of August, 1908, leaving an estate consisting in part of the lands described in plaintiff's petition.

The court further finds that the plaintiff, Laban Miles, and defendant, John Kenny, above named are the only heirs at law of said Lah-tah-sah, deceased, and as such plaintiff Laban Miles owns an undivided one-half interest, and the defendant John Kenny owns an undivided one-half interest in and to the lands allotted and deeded to said Lah-tah-sah, described in plaintiff's petition, to wit:

N. W. ¼ of section 26, Township 24, Range 4, N. E. ¼ of section 30, Township 28, Range 9; S. E. ¼ of Section 30, Township 28, Range 9; Lot 3, E. ½ of S. W. ¼ of N. W. ¼, S. E. ¼ of N. W. ¼, N. ½ of S. E ¼ of section 4, Township 20, Range 10, all North and East of the Indian Base and Meridian in Osage County, Oklahoma.

The court further finds that no part of the lands described was ever used, occupied or claimed by said Lah-tah-sah, deceased, or any of the parties to this action as a homestead, and that no part of same was the homestead of said Lah-tah-sah, or of any of the parties to this action. The court further finds that the parties hereto have been unable to agree upon a partition or division of said lands.

It is therefore ordered, adjudged and decreed by the court that the plaintiff, Laban Miles, and the defendant, John Kenny, are the owners in common of the lands described, and their respective interests and ownership therein is as follows:

110 Laban Miles, plaintiff, Osage Allottee No. 507, an undivided one-half.

John Kenny, defendant, Osage Allottee No. 257, an undivided one-half.

and that the shares of the aforesaid parties and their respective interests in the lands above described as above set forth, be and the same are hereby confirmed. It is further ordered, adjudged and decreed by the court that partition of said lands be made accordingly; that W. T. Mosier, J. W. Soderstrom, and W. E. Savage, are hereby appointed commissioners to make partition of said property among the parties according to their respective interests as herein fixed and determined, if such partition can be made without manifest injury. But if such partition cannot be made, the commissioners herein named shall make a valuation and appraisement of the property herein described and make a report of their proceedings to the court.

R. B. BOONE,
Special Judge.

Endorsed: No. 1896. In the District Court of Osage County, Oklahoma, Laban Miles, vs. John Kenney. Journal Entry. Filed this the 31st day of May, 1913. Thos. Leahy, Jr., Clerk of the Dist. Court. White & Widdows, Pawhuska, Okla., att'ys, for plaintiff.

Added by stipulation: "Recorded in Jour. 5 page 326.

"Laban Miles' Ex. 16."

111 7954. *Allotment Deed.* 282.

Allotment Deed, Osage Reservation, Oklahoma.

Allotment No. 256.

Osage Indian Lands from Peter C. Bigheart, Principal Chief,
to
Lah-tah-sah.

STATE OF OKLAHOMA,
Osage County, ss:

The within instrument was filed for record on the 10 day of Aug. 1909, at 10 o'clock A. M., and recorded in Book 1 A. D. on page 282.

[SEAL.] T. M. BROADDUS,
Register of Deeds.

To all to whom these presents shall come, Greeting:

Whereas The Act of Congress approved June 28, 1906, entitled "An Act for the division of the lands and funds of the Osage Indians in Oklahoma Territory, and for other purposes" (34 Stat. L., 539) provides that all the lands belonging to the Osage Tribe of Indians in Oklahoma, except as therein provided, shall be divided among the members of said tribe; and

Whereas, said Act of Congress further provides that all lands selected by and allotted to each member (except his homestead) shall be designated "surplus lands"; and

Whereas, Lah-tah-sah, a duly enrolled and recognized member of the Osage Tribe, has selected his homestead in accordance with law; and

Whereas, The Osage Allotting Commission, as provided for in the sixth Sub-Division of Section 2 of said Act of Congress, has certified that the lands hereinafter described constitute the surplus lands of said Lah-tah-sah, as contemplated by said Act of Congress; and

Whereas, Section 8 of the Act provides that all deeds to said Osage lands, or any part thereof, shall be executed by the Principal Chief of the Osages, but no such deed shall be valid until approved by the Secretary of the Interior;

112 Now, therefore, I, the undersigned, Principal Chief of the Osage Tribe of Indians, by virtue of the power and authority vested in me by the said act of Congress have granted and conveyed, and by these presents do grant and convey, unto the said Lah-tah-sah, all right, title, and interest of the United States and the Osage Tribe of Indians in and to the following described lands situated on the Osage Reservation in Oklahoma, to wit:

Northeast ¼ of Section (30), Township twenty-eight (28), Range Nine (9); Southeast ¼ of Section Thirty (30), Township Twenty-eight (28), Range Nine (9); Lot three (3), East ½ of Southwest ¼

of Northwest ¼, Southeast ¼ of Northwest ¼, North ½ of Southeast ¼ of Section Four (4), Township twenty (20), Range Ten (10); all North and east of Indian Base and Meridian, containing 500.12 acres, more or less, according to the United States survey thereof, to have and to hold the same unto the said Lah-tah-sah, her heirs, executors, administrators and assigns, forever; subject, however, to all the conditions, limitations, and provisions of said Act of Congress, one of which is that the oil, gas, coal, or other minerals covered by the lands for the selection and *vidision* of which provision is herein made are hereby reserved to the Osage Tribe for a period of twenty-five years from and after the eighth day of April, nineteen hundred and six.

In witness whereof, I, the Principal Chief of the Osage Tribe of Indians, have hereunto set my hand and seal this 5th day of May, 1909.

All erasures and interlineations made before signing hereof.

PETER C. BIGHEART, [SEAL.]
Principal Chief of the Osages.

Witnesses:

L. H. HAUSS.
ORLO C. LOWRY.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS, Jul- 26, 1909.

The foregoing is respectfully submitted to the Secretary of the Interior with the recommendation that it be approved.

F. H. ABBOTT,
Assistant Commissioner.

DEPARTMENT OF THE INTERIOR, Jul- 30, 1909.

The foregoing deed is hereby approved.

FRANK PIERCE,
Acting Secretary.

"John Kenny's Ex. A."

113 4870. *Homestead Deed.* 247.

Homestead Deed, Osage Reservation, Oklahoma.

Allotment No. 256.

Homestead Deed, Osage Indian Lands, from Peter Bigheart, Principal Chief,

to

Lah- tah-sah.

#256.

STATE OF OKLAHOMA,
Osage County, ss:

The within instrument was filed for record on the 2 day of Mar. 1909, at 2 o'clock P. M., and recorded in Book 1, H. D. on page 247.
[SEAL.] T. M. BROADDUS,
Register of Deeds.
By —— ——, *Deputy.*

OFFICE OF INDIAN AFFAIRS,
LANDS DIVISION,
—— —, 19—.

Recorded in Deed Book, Osage Indian Lands, Vol. —, Page —.

To all to whom these presents shall come, Greeting:

Whereas, The Act of Congress approved June 28, 1906, entitled "An Act for the division of the lands and funds of the Osage Indians in Oklahoma Territory, and for other purposes" (34 Stat. L., 539), provides that all the lands belonging to the Osage Tribe of Indians in Oklahoma, except as therein provided, shall be divided among the members of said tribe; and

Whereas, said Act of Congress further provides that each member of the tribe may make three selections of land of one hundred and sixty acres each; and that after these selections have been made each member of the tribe may designate which selection shall be his homestead, and that the certificates of allotment and deed shall designate the homestead selection; and

Whereas, the Osage Allotting Commission, as provided for in the Sixth Sub-Division of Section 2 of the Act, has certified that the land hereinafter described has been designated by or on behalf of Lah-tah-sah, a duly enrolled and recognized member of the Osage tribe, as *his* homestead; and

Whereas, Section 8 of the Act provides that all deeds to said Osage lands, or any part thereof, shall be executed by the
114 Principal Chief of the Osages, but no such deed shall be valid until approved by the Secretary of the Interior;

Now, therefore, I, the undersigned, Principal Chief of the Osage Tribe of Indians, by virtue of the power and authority vested in me by the said Act of Congress have granted and conveyed, and by these presents do grant and convey, unto the said Lah-tah-sah, all right, title, and interest of the United States and the Osage Tribe of Indians in and to the following described lands situated on the Osage Reservation in Oklahoma, towit:

Northwest quarter of section twenty-six (26); Township twenty-four (24), North, Range Four (4) East of the Indian Meridian, containing 160.00 acres, more or less, according to the United States survey thereof, to have and to hold the same unto the said Lah-tah-sah, her heirs, executors, administrators, and assigns, forever; subject, however, to all the conditions, limitations, and provisions of said Act of Congress, one of which is that the homestead selection shall be inalienable and non-taxable until otherwise provided by Act of Congress, and all mineral in said land reserved to the Osage Tribe of Indians for the period of twenty-five years from and after the eighth day of April, 1906.

In witness whereof, I, the Principal Chief of the Osage Tribe of Indians, have hereunto set my hand and seal this 23rd day of September, 1908.

PETER C. BIGHEART, [SEAL.]
Principal Chief of the Osages.

Witnesses:

HEALY M. LOOMER.
LINFRED H. HAUSS.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS, Jan. 19, 1909.

The foregoing is respectfully submitted to the Secretary of the Interior with the recommendation that it be approved.

R. G. VALENTINE,
Acting Commissioner.

DEPARTMENT OF THE INTERIOR, Feb. 20, 1909.

The foregoing deed is hereby approved.

JESSE E. WILSON,
Assistant Secretary.

"John Kenney's Ex. B."

115 In the District Court in and for Osage County, State of Oklahoma.

No. —.

In the Matter of the ESTATE OF LAH-TAH-SAH, Osage Allottee No. 256, Deceased, on Appeal from the County Court of Osage County, Oklahoma.

Reporter's Certificate.

I, Florene Isnard, the duly appointed, qualified and acting Court Reporter, in and for the District Court of the 24th Judicial District, in and for Osage County, Oklahoma, in the above entitled cause, hereby certify that on the 2nd day of April, 1915, at and under the direction of the court, I faithfully and accurately reported all the oral testimony, objections and exceptions of parties, rulings of the court, matters and proceedings had and done in the trial of the above entitled cause; that I later reduced my shorthand notes so taken to typewriting, and also made true and correct copies of all exhibits and documentary evidence introduced or offered in the trial of said cause, and I further certify that the above and foregoing is a full, true and correct and complete statement and transcript of all the evidence, both oral and documentary offered or introduced in the trial of said cause and of the objections of parties thereto, the rulings of the court thereon and of the exceptions taken to such rulings.

Witness my hand at Pawhuska in said County and State this the 25th day of June, A. D., 1915.

FLORENE ISNARD,
Court Reporter.

116 Be it known that thereafter on said April 2nd, 1915, the same being a judicial day of the said District court, said Special Judge presiding, and after the introduction of such testimony, the said Laban Miles and John Kenny rested, and the same was argued to the court and the court being fully advised in the premises, found the issues in favor of, and rendered judgment for the said Laban Miles, to all of which findings and rulings the said John Kenny duly excepted, which said ruling of the court overruling of the demurrer of the said John Kenny to the plea of res adjudicata of the said Laban Miles; and the order sustaining the motion of Laban Miles to strike out parts of the answer, and the finding and judgment of the court upon the trial of said cause and the exceptions taken, were and are, as shown by journal entry duly made and filed in said court on April 2nd, 1915, in the words and figures following, towit:

117 STATE OF OKLAHOMA,
County of Osage, ss:

In the District Court of Osage County, Oklahoma.

No. 2372.

In the Matter of the Estate of LAH-TAH-SAH, Osage Allottee #256, Deceased, on Appeal from the County Court to the District Court.

Journal Entry of Judgment.

Now on this 2nd day of April, 1915, same being a regular judicial day of the March 1915 term of said court the above entitled matter came on regularly for hearin*b* before A. R. Museller, Special Judge, pursuant to adjournment had on March 8th, 1915, the appellant John Kenney, appearing in his own proper person and by John Embry, his attorney, and appellee, Laban Miles, appearing in his own proper person and by H. P. White, his attorney and said cause coming up for hearing first on the demurrer of appellant, John Kenny, to the plea of res adjudicata of the appellee, Laban Miles, and the court having heard the argument of counsel and being fully advised in the premises finds that said demurrer to said plea of res adjudicata should be overruled, to which finding of the court said John Kenny objects and excepts, which objections and exceptions are by the court allowed.

It is therefore, ordered, adjudged and decreed by the court that said demurrer to said plea of res adjudicata be and the same hereby is by the court overruled, to which ruling of the court said John Kenny objects and excepts, which objections and exceptions are by the court allowed.

Thereafter, to wit: on the 2nd day of April, 1915, the above entitled cause came on further for hearing before A. R. Museller, Special Judge, upon a motion of appellee, Laban Miles, to strike portions of the answer of said John Kenny to the plea of res adjudicata of the said Laban Miles, the parties further appearing as hereinabove stated and the court having heard the argument of
118 counsel and being fully advised in the premises finds that said motion should be sustained to which ruling of the court said John Kenny objects and excepts, which said objections and exceptions are by the court allowed.

It is therefore, ordered, adjudged, and decreed by the court that said motion to strike all that part and parts of said answer of John Kenny to the plea of res adjudicata by said Laban Miles designated as "2", "3*a*", "3*b*", and "3*c*" be, and the same hereby is, by the court, sustained, to which ruling of the court the said John Kenny specially excepts to said ruling of the court as to that part of the answer designated as "2" and further specially excepts to the ruling of the court as to that part of the answer designated as 3*a* and specially excepts to the ruling of the court as to that part of the answer designated as

"3*b*", and further specially excepts to the ruling of the court as to that part of the answer designated as "3*c*", which objections and exceptions are by the court allowed.

Thereafter, to wit: on the 2nd day of April, 1915, the above entitled matter came on regularly for hearing before A. R. Museller, Special Judge, pursuant to adjournment had on March 8th, 1915, upon the final account of John L. Bird, Administrator, the exceptions filed thereto by appellant, John Kenny, the plea of res adjudicata filed by the appellee, Laban Miles, and the answer of John Kenny to the said plea of res adjudicata by said Laban Miles. The appellant, John Kenny further appearing in his own proper person and by John Embry, his attorney and the appelle-, Laban Miles, further appearing in his own proper person and by H. P. White, his attorney, and all parties waive trial by jury and announce ready for trial by the court. Thereupon the appellee, Laban Miles, offers his testimony, and rests, and thereupon, appellant, John Kenny, offers his testimony, and rests, and the court having heard the evidence and the argument of counsel and being fully advised in the premises finds that the final account rendered by John L. Bird, administrator of the estate of said Lah-tah-sah, deceased, is true and correct;
119 that said administrator has made no profit out of the estate and has made disbursements as stated in said account and statement of disbursements since rendition of said final account and that said disbursements should be approved. The Court further finds that the administrator is entitled to the sum of $12.00 as commission on the amount of money belonging to said estate received and accounted for by said administrator.

The court further finds from the evidence that the heirs of the estate of said Lah-tah-sah, deceased have heretofore been determined by the District Court of Osage County, Oklahoma, in the partition suit of Laban Miles, plaintiff, vs. John Kenny, defendant, No. 1896, as per judgment of court pleaded herein by said Laban Miles as a plea of res adjudicata. That said plea of res adjudicata should be sustained.

The court further finds from the evidence that the sole and only legal heirs of said Lah-tah-sah, deceased, are appelle-, Laban Miles, surviving husband and appellant, John Kenny, the only living issue of said Lah-tah-sah, deceased; that upon the death of said Lah-tah-sah, deceased, her entire estate consisting of lands, moneys and mineral interests acquired by her through the division of the lands of the Osage Indians in Oklahoma, and the segregation of moneys belonging to said tribe held by the United States, as a member of the Osage Tribe of Indians, descended in equal shares to said Laban Miles, surviving husband and said John Kenny, only living child, to wit: an undivided one-half to each; that the judgment of the County Court of Osage County, Oklahoma, rendered on the 14th day of March, 1914, appealed from, should in all things be affirmed, to all of which findings, said John Kenny objects and excepts, which objections and exceptions are by the court allowed.

It is, therefore, ordered, adjudged and decreed by the court that the plea of res adjudicata of appellee, Laban Miles, should be, and

the same hereby is, by the court, sustained and that the final
120 account of said John L. Bird, administrator of said estate be, and the same hereby is, by the court, approved and that said John L. Bird deduct from the money in his hands belonging to said estate the sum of $12.00 as compensation for services rendered by him in said estate and file a receipt therefor; that said administrator pay the accrued costs in the county court now unpaid less the cost of preparing transcript for appeal, out of the money in his hands belonging to said estate, and file receipt therefor; that appellant, John Kenny pay the costs accruing on appeal including the costs of transcript in the county court.

It is further ordered, adjudged and decreed by the court that the sole and only heirs of Lah-tah-sah, deceased, Osage Allottee, No. 256, are Laban Miles, surviving husband and John Kenny, the only living issue of said Lah-tah-sah, deceased, at the time of her death; that upon the death of said Lah-tah-sah, deceased, her entire estate descended in equal shares to said Laban Miles and to said John Kenny, to wit: an undivided one-half thereof to each and that upon the payment of costs and administration fees by said administrator as herein provided that said administrator pay the remainder now in his hands belongng to said estate, one-half to said Laban Miles and One-half to said John Kenny and take their receipt therefor, to all of which rulings, orders and judgment of the court said John Kenny objects and excepts, which objections and exceptions are by the court allowed.

A. R. MUSELLER,
Special Judge.

O. K.
H. P. WHITE,
Attorney for Laban Miles.
JOHN EMBRY,
Attorney for John Kenny.

Endorsed: Filed Apr. 2, 1915. Thos. Leahy, Court Clerk. By Eula B. —, Deputy. Rec. Journ. 7 page 461.

121 Be it known that thereafter, on said April 2nd, 1915, the said John Kenny duly made and filed in said cause and court. his motion for a new trial, which said motion, together with all the indorsements thereon, was and is in the words and figures following, to wit:

122 In the District Court of Osage County, Oklahoma, Honorable A. R. Museller, Special Judge, Presiding.

In the Matter of the Estate of LAH-TAH-SAH, Osage Allottee No. 256, Deceased, on Appeal from the County Court of Osage County, Oklahoma.

Motion for New Trial.

Comes now John Kenny, heir at law of the said Lah-tah-sah, deceased, and moves the Court to vacate and set aside the findings, decree and judgment herein, and grant this Movant a new trial, for the following errors and causes which effect materially the substantial rights of the said John Kenny.

1. Error of law committed by the Court in overruling the demurrer of John Kenny to the plea of res adjudicata herein, and excepted to by John Kenny.

2. Error of law committed by the Court in sustaining the motion of the said Laban Miles in striking out Paragraph 2 of this Movant Answer herein, and excepted to by John Kenny.

3. For error of law on the part of the Court in sustaining said motion in striking out Paragraph 3-*a* of said Answer, and excepted to by John Kenny.

4. For error of law by the Court in sustaining said motion in striking out Paragraph 3-*b* of said answer, and excepted to by John Kenny.

5. And for error of law by the Court in sustaining said motion in striking out Paragraph 3-*c* of said answer, and excepted to by John Kenny.

6. For error of law committed by the court at the trial, in excluding competent, material, and relevant testimony offered
123 by the said John Kenny in his behalf, and which rulings were excepted to by said John Kenny at the time.

7. For errors of law committed by the Court at the trial in admitting incompetent, irrelevant, and immaterial testimony offered by the said Laban Miles, and objected to by this Movant, to which this Movant, John Kenny, excepted at the time.

8. For errors of law occurring at the trial and excepted to by this Movant, John Kenny, at the time.

9. For the reason that the finding, decision and decree of the court are not sustained by sufficient evidence, but are contrary to the evidence.

10. That the decree, decision and finding of the court is contrary to law.

11. For error of the court in sustaining the plea of res adjudicata set up and plead herein by the said Laban Miles, and for the refusal of the court to permit this movant to introduce testimony touching the fact whether or not the said Laban Miles was ever married to the deceased, and excepted to by John Kenny at the time.

12. For errors of law occurring at the trial in that said John

Kenny was not granted a trial de novo in this court, and was not granted a trial of the rights of heirs to the estate and property of said deceased, to which said John Kenny excepted at the time.

13. For errors of law committed at the trial by the Court in refusing to admit the testimony offered for the purpose of showing that the said Laban Miles was not married to the said Lah-tah-sah, and was not an heir of the said Lah-tah-sah, which ruling was excepted to by the movant at the time.

14. The court erred at the trial in refusing to hear the testimony for the purpose of determining the legal heirs of the
124 said deceased, and in holding that the issues in that respect was concluded by the finding and judgment set up and contained in the said writing, marked "Laban Miles' Exhibit 4", a former judgment of the District Court of said county, to which John Kenny excepted at the time.

15. The court committed errors of law at the trial in admitting evidence in support of the plea of Laban Miles setting forth the prior adjudication and determination of the district court of said County, of the heirs of said deceased.

16. The court committed errors of law at the trial in permitting Laban Miles to introduce the said Exhibit 4, and the other exhibits relating thereto, for the reason that they have never been approved by the Secretary of the Interior, and pertain to the restricted lands of the deceased Osage Allottee.

For error of law in the assessment of the amount of recovery which was excessive in that the judgment attempts to make distribution of lands and moneys of deceased belonging to her as an Osage Indian Allottee, which are restricted and not within the jurisdiction of said court.

JOHN EMBRY,
Attorney for John Kenny.

Endorsed: Filed Apr. 2, 1915. Thos. Leahy, Court Clerk. By Eula B. Foley, Deputy.

125 Be it known that thereafter, towit, on the 2nd day of April, 1915, the motion of the said John Kenny for a new trial in the above entitled cause coming on regularly to be heard before said Court the Hon. A. R. Museller, special judge, presiding, the same was duly argued by counsel, considered by the court and overruled, to which ruling John Kenny took exceptions, and for good cause shown, was given ninety (90) days within which to make and serve a case made for appeal to the Supreme Court, which said judgment and order overruling said motion for a new trial and such exceptions and the time given within which to make and serve a case made, together with all indorsements thereon, is in the words and figures following, towit:

126 STATE OF OKLAHOMA,
County of Osage, ss:

In the District Court of Osage County, Oklahoma.

No. 2372.

In the Matter of the Estate of LAH-TAH-SAH, Osage Allottee # 256, Deceased, on Appeal from the County Court to the District Court.

Now on this 2nd day of April, 1915, the same being a regular judicial day of the March, 1915, term of said court the above entitled matter came on for further hearing before A. R. Museller, Special Judge, upon a motion of appellant, John Kenny for a new trial said John Kenney appearing in his own proper person and by John Embry, his attorney and appellee, Laban Miles, appearing in his own proper person and by H. P. White, his attorney and the court having heard the argument of counsel and being fully advised in the premises finds that said motion for new trial should be overruled to which finding of the court the said John Kenny objects and excepts, which objections and exceptions are by the court allowed.

It is therefore ordered, adjudged and decreed by the court that said motion of the said John Kenny for a new trial be and the same hereby is by the court overruled to which ruling of the court the said John Kenny objects and excepts, which objections and exceptions are by the court allowed.

Thereupon said John Kenny asks 90 days in which to make and serve a case made; that said Laban Miles be allowed 10 days thereafter in which to suggest amendments to said case made and that said case made be signed and settled on 5 days written notice by either party and that said John Kenny be allowed 120 days to file petition in error in the Supreme Court.

127 It is, therefore, further ordered, by the court that for good cause shown said John Kenny have 90 days in which to make and serve a case made for appeal to the Supreme Court; that said Laban Miles have 10 days thereafter in which to suggest amendments to said case made, said case made to be settled and signed on 5 days written notice by either party, and that said John Kenny have 120 days to file petition in error in the Supreme Court.

And for good cause shown it is further ordered by the court that said John Kenny have 20 days in which to file a supersedeas bond in the sum of $106.00.

A. R. MUSELLER,
Special Judge.

O. K.
H. P. WHITE,
Attorney for Laban Miles.
JOHN EMBRY,
Attorney for John Kenny.

Endorsed: Filed April 2, 1915. Thomas Leahy, County Clerk. By Eula B. Foley, Deputy.

Recorded Journal 7, page 460.

128 Be it known that thereafter, on the 16th day of April, 1915, the said John Kenny made and filed in said court, which was duly approved by the Clerk thereof, a supersedeas bond, which was and is in the words and figures following, towit:

129 In the District Court of Osage County, Oklahoma.

No. 2372.

In the Matter of the Estate of LAH-TAH-SAH, Osage Allottee No. 256, Deceased, on Appeal from the County Court to the District Court.

Supersedeas Bond.

Know all men by these presents: That John Kenny, as principal and James J. Quarles and Chas. A. Foster as sureties, are held and firmly bound to Laban Miles, claimant in the above entitled cause, in the sum of One Hundred and Six ($106.00) Dollars for the payment of which well and truly to be made, we, and each of us, do hereby jointly and severally bind ourselves, our heirs and personal representatives.

Dated this 14th day of April, A. D., 1915.

The condition of the foregoing obligation is such that,

Whereas, on the second day of April, 1915, judgment was rendered in said District Court in favor of said obligee, Laban Miles, claimant in said cause, and against said John Kenny, that the said Laban Miles was an heir at law of said Lah-tah-sah, deceased, and that the entire estate of said decedent descended to said Laban Miles and John Kenny in equal parts, and that the administrator pay to them in equal parts the remainder of said estate in his hands after payment of cash and administration fees.

And, whereas, said John Kenny has taken an appeal from said judgment to the Supreme Court of Oklahoma; and his supersedeas bond has been fixed at $106.00.

Now, therefore, if the said principal obligee herein, John Kenny, shall pay to the said obligee the condemnation money and
130 costs in case the judgment or final order shall be adjudged against him, or affirmed in whole or in part, then this obligation shall be void; otherwise to remain in full force and effect.

JOHN KENNY,
Principal.
JAMES J. QUARLES,
CHAS A. FOSTER,
Sureties.

STATE OF OKLAHOMA,
Osage County, ss:

James J. Quarles and Chas. A. Foster, each of lawful age, being duly sworn says that he is one of the sureties on the foregoing Bond, that he is a freeholder and resident of Osage County, Oklahoma, and that he is worth the sum of Five hundred dollars ($500.00) in property subject to execution over and above his debts, liabilities and exemptions.

JAMES J. QUARLES.
CHAS. A. FOSTER.

Subscribed and sworn to before me this 16th day of April, 1915.

F. O. QUARLES,
[SEAL.] *Notary Public.*

My commission expires January 17, 1918.

Endorsed: Filed Apr. 19, 1915. Thos. Leahy, Court Clerk. Approved April 19, 1915. Thos. Leahy, Court Clerk.

131 The above and foregoing contains true, full, correct and complete copies of all the pleadings, certified copies, transcripts, motions, orders, demurrers, judgments and proceedings had, made and rendered in the above entitled cause, and contains all of the evidence, both oral and documentary, introduced or offered on the trial of said cause, together with all objections of parties and counsel thereto, the rulings and remarks of the court thereon, and the exceptions taken thereto; and is a full, true, correct and complete transcript and statement of all pleadings, certified copies, transcripts, motions, orders, judgments, journal entries, evidence, matters and proceedings had and done in the above entitled cause and of the final judgment of the court in said cause, and constitutes a full, true and complete case made for the Supreme Court of Oklahoma in said cause.

132 In the District Court of Osage County, State of Oklahoma.

No. 2372.

In the Matter of the ESTATE OF LAH-TAH-SAH, Osage Allottee, No. 256, Deceased, on Appeal from the County Court to the District Court.

We, the undersigned, attorneys for the Appellant, John Kenney, above named, do hereby certify that the above and foregoing is in all respects a full, true, correct and complete case made.

Witness our hands this the 25th day of June, 1915.

E. R. HASTINGS,
PAUL VAN WINKLE,
Attorneys for John Kenny, Appellant.

STATE OF OKLAHOMA,
Osage County, ss:

We, the undersigned, attorneys for the Appellee, Laban Miles, in the above entitled cause, do hereby acknowledge service of the above and foregoing, this the 26th day of June, 1915.

H. P. WHITE,
Attorney for Laban Miles.

And, we do hereby waive the suggestions of any amendments thereto and hereby consent that the same may be settled and signed at any time and place, as a true and correct case made in said cause, by the Judge who tried said cause, without further notice to us of the time and place of such signing and settlement, and we do hereby waive the issuance and service of summons from the Supreme Court of Oklahoma in said cause.

Witness our hands this the — day of June, 1915.

____ ____,
Attorney for Laban Miles.

133 Be it known that thereafter on, towit, July 6, 1915 the said John Kenny by his counsel duly served upon H. P. White, attorney for said Laban Miles, a written notice of the time and place for settling and signing said case made, which notice was duly accepted and the service thereof acknowledged by the said H. P. White, which notice and the acceptance of service thereof is in the words and figures following, towit:

134 In the District Court in and for Osage County, State of Oklahoma.

No. 2372.

In the Matter of the ESTATE OF LAH-TAH-SAH, Osage Allottee, Number 256, Deceased, on Appeal from the County Court to the District Court.

Notice of Settlement of Case Made.

To Laban Miles and H. P. White, attorney of record for said Laban Miles:

You are hereby notified that on the 12th day of July, 1915, at the hour of four o'clock in the afternoon of said day, or as soon thereafter as counsel can be heard, the undersigned attorneys for John Kenny, appellant in the above entitled cause, will, at the District Court Room in the City of Pawhuska, Osage County, Oklahoma, present the case made in the above entitled cause served on the said H. P. White, attorney, on, towit, June 26th, 1915, together with all amendments thereto suggested or which may be suggested by you, to the Honorable A. R. Museller, Special Judge who tried and ren-

dered final judgment in said cause in the District Court of the Twenty-fourth Judicial District, in and for Osage County, Oklahoma, for settlement, and said special judge will then and there be requested to settle and sign at said time and place said case made as it now is or as it may be amended by him, as a true and correct case made in said cause, and to direct that it be attested, sealed and filed by the Clerk of said Court.

JOHN EMBRY,
E. R. HASTINGS,
PAUL VAN WINKLE,
Attorneys for John Kenny.

Service of the above notice is hereby accepted this 6th day of July, 1915.

H. P. WHITE,
Attorney for Laban Miles.

135 Be it known that thereafter on said July 6, 1915, the said special Judge, A. R. Museller, presiding, the District Court of said Osage County, Oklahoma made an order fixing time for settling and signing said case made, which order with all endorsements thereon is in the words and figures following, towit:

136 In the District Court in and for Osage County, State of Oklahoma.

No. 2372.

In the Matter of the ESTATE OF LAH-TAH-SAH, Osage Allottee, Number 256, Deceased, on Appeal from the County Court to the District Court.

Order for Settlement.

Now, towit, on this July 6th, 1915, the same being a judicial day of the above entitled court, the above entitled cause came on for hearing upon the application of John Kenny, appellant, by his attorney, for the fixing of a date for the settlement and signing of a case made in said cause, the Honorable A. R. Museller, Special Judge of said Court presiding, and it being made to appear to said special judge and court, that the said John Kenny by his attorneys has served Laban Miles the Appellee in said cause and H. P. White, attorney for said Laban Miles, with a notice in writing that they will present the said case made and suggestions of amendments to said special Judge at the District Court Room in Pawhuska, said Osage County, Oklahoma, at the hour of four o'clock P. M., July 12th, 1915, or as soon thereafter as counsel can be heard for settlement and will ask the settlement and signing of a case made in said cause and for other orders;

Now, therefore, it is ordered that the said case made and sugges-

tions of amendments be presented to the said special Judge at four o'clock P. M., July 12th, 1915, at the said District Court room in Pawhuska, said County and State for settlement and that a case made in said cause be settled and signed by said special judge at said time and place or as soon thereafter as the same can be con-
137 cluded; and that all other proper orders be made for the attestation, sealing and filing of the same.

A. R. MUSELLER,
Special Judge.

In the District Court of the Twenty-fourth Judicial District.

STATE OF OKLAHOMA,
Osage County, ss:

I, Thos. Leahy, Clerk of the District Court of the Twenty-fourth Judicial District of the State of Oklahoma, do hereby certify that the foregoing is a true and correct copy of the original order on file and of record in my office at Pawhuska, Oklahoma.

In Testimony whereof I have hereunto set my hand and affixed the seal of said Court at Pawhuska, Okla., in said District, this the 6 day of July, 1915.

[SEAL.] THOS. LEAHY, *Clerk.*

Endorsed: In the District Court in and for Osage County, State of Oklahoma. In the matter of the estate of Lah-tah-sah, Osage Allottee, No. 256, deceased, on appeal from the District Court to the County Court. Order fixing date for settlement of case made. District Court, State of Oklahoma, County of Osage. Pawhuska, Okla. Filed July 6 1915. —— ——, Court Clerk, by —— ——, Deputy.

138 Be it known that thereafter on July 12, 1915, the said Laban Miles filed in said District Court of Osage County, Oklahoma, his motion to strike from the files the appeal bond and notice of appeal filed in said Osage County Court, Oklahoma, which motion with all endorsements thereon is in the words and figures following, towit:

139 STATE OF OKLAHOMA,
County of Osage, ss:

In the District Court of Osage County, Oklahoma.

No. 2372.

In the Matter of the ESTATE OF LAH-TAH-SAH, Osage Allottee, No. 256, on Appeal from the County Court to the District Court.

Motion.

Comes now Laban Miles, a party of interest in the above entitled matter and moves the court to strike from the files of the above entitled and numbered action, the pretended notice of appeal from the County Court to the District Court for the reason and upon the ground that no copy of said pretended notice of appeal was ever served on the Superintendent of the Osage Agency, at the time of filing as required by an Act of Congress approved April 18, 1912 (Public No. 125), by reason whereof said pretended notice of appeal is an incumbrance of the record not entitled to be filed, and should be stricken therefrom.

(2) Said Laban Miles further moves the court to strike from the files and record of the above entitled matter and number the pretended appeal bond on appeal from the County Court to the District Court for the reason and upon the ground that no copy thereof has ever been served on the Superintendent of the Osage Agency, as required by an Act of Congress approved April 18, 1912, (Public No. 125), for which reason said pretended appeal bond is an incumbrance of the record and not entitled to be filed as a part of the record in said matter.

H. P. WHITE,
Attorney for Laban Miles.

140 Be it known that thereafter on said July 12, 1915, the said motion of the said Laban Miles to strike said appeal bond and notice of appeal coming on to be heard in said District Court, the said special Judge, A. R. Muselle, presiding, and after argument of counsel and consideration by the court, the court overrules said motion; to which ruling said Laban Miles duly excepts and exceptions are allowed, which said rulings and exceptions together with all endorsements thereon are in the words and figures following, towit:

141 In the District Court in and for Osage County, State of Oklahoma.

No. 2372.

In the Matter of the Estate of LAH-TAH-SAH, Osage Allottee #256, on Appeal from the County Court to the District Court.

Journal Entry Overruling Motion to Strike Notice of Appeal and Appeal Bond from the Record.

Now on this 12th day of July 1915, the same being a regular judicial day of the June 1915 term of said Court, the above entitled matter came on for hearing before A. R. Museller, special judge, upon a motion of Laban Miles to strike from the record notice of appeal and appeal bond filed in the County Court, and copies thereof included in the transcript of the record filed in this court, Laban Miles, a party of interest, appearing by H. P. White, his attorney, and John Kenny, a party of interest, appearing by John Embry and E. R. Hastings, his attorneys, and the court having examined said motion and having heard the argument of counsel, and being fully advised in the premises finds that said motion should be overruled.

It is therefore ordered by the court that said motion, and the same hereby is by the court, overruled to all of which said Laban Miles objects and excepts which objections and exceptions by the court are allowed.

A. R. MUSELLER,
Special Judge.

Endorsed: Filed in open Court July 12, 1915. Thos. Leahy, Court Clerk.

142 Be it know that on July 6, 1915, the appellee, Laban Miles duly served upon counsel for John Kenny and on John Kenny the suggestion of amendments to said case made as follows, towit:

143 In the District Court in and for Osage County, State of Oklahoma.

No. 2372.

In the Matter of the Estate of LAH-TAH-SAH, Osage Allottee #256, on Appeal from the County Court to the District Court.

Suggestions of Amendments to Case-made.

Comes now Laban Miles by H. P. White, his attorney, and suggests that the case made prepared and served by John Kenny on

H. P. White, attorney for Laban Miles, June 26, 1915, be amended as hereinafter stated, and moves the court that said case-made be amended as follows, towit:

(1) Said Laban Miles moves the court to strike from said case-made pages 34, 35, 36 and 37, same being a copy of pretended notice of appeal for the reason and upon the ground that the original pretended notice of appeal and no copy thereof was ever served on the Superintendent of the Osage Agency at the time of filing as required by an Act of Congress approved April 18, 1912, (Public No. 125), for which reason said pretended notice of appeal is not a part of the record and not entitled to be included in said case-made.

(2) Said Laban Miles moves the court to strike from said case-made the pretended appeal bond as shown at page 32 of said case-made for the reason and upon the ground that the original and no copy thereof have ever been served on the Superintendent of the Osage Agency for which reason said pretended appeal bond
144 is an incumbrance of the record, not a part of the record and not entitled to be included in said case-made.

H. P. WHITE,
Attorney for Laban Miles.

Service of the within and foregoing suggestions of amendments, and the receipt of a copy thereof is hereby acknowledged this 6th day of July, 1915.

E. R. HASTINGS,
JOHN EMBRY,
Attorneys for John Kenny.

145 It is stipulated by the parties to the above entitled action that further time and notice of the settlement of the case-made herein be and the same is hereby waived.

E. R. HASTINGS,
JOHN EMBRY,
Attorneys for John Kenny.
H. P. WHITE,
Attorney for Laban Miles.

146 In the District Court of Osage County.

In the Matter of the Estate of LAH-TAH-SAH, Osage Allottee #256, Deceased, on Appeal from the County Court to the District Court.

Order Disallowing Amendments to Case-made as Suggested.

Now on this 12th day of July, 1915, same being a regular judicial day of the June 1915 term of said court, the above entitled matter came on for hearing before A. R. Museller, Special Judge, who tried said case upon suggestion of amendments to case-made on behalf of Laban Miles. Said Laban Miles appearing by H. P.

White, his attorney, and John Kenny appearing by E. R. Hastings and John Embry, his attorneys, and the court having considered said suggested amendments to said case-made, and having heard the argument of counsel and being fully advised in the premises overrules and disallows said suggested amendments, designated and numbered one and two and set out at page 125 of the foregoing case-made, to all of which said Laban Miles objects and excepts, which objections and exceptions are by the court allowed.

A. R. MUSELLER,
Special Judge.

Endorsed: Filed in open court July 12, 1915. Thos. Leahy, District Clerk.

147 In the District Court of Osage County, Oklahoma.

No. 2372.

In the Matter of the Estate of LAH-TAH-SAH, Osage Allottee #256, Deceased, on Appeal from the County Court to the District Court.

Judge's Certificate.

I, the undersigned Judge of the Twenty-fourth Judicial District in and for Osage County, Oklahoma, that is, the special Judge who, in said court, tried and rendered judgment in the action entitled hereinbefore, "In the matter of the estate of Lah-tah-sah, Osage Allottee No. 256, deceased, on appeal from the County Court to the District Court," hereby certify that the foregoing was presented to me as the case-made in the action above entitled, including the service, the notice and order for the time and place of settling and signing the same, and the motion of the said Laban Miles to strike as therein recited, and the order of the court thereon, and as the suggestion of amendments to said case-made by the said Laban Miles, and the order disallowing the same, and as the stipulation of parties waiving further time or notice of the settling of said case-made, in the action above entitled, at the District Court room in the City of Pawhuska, Osage County, Oklahoma, on the 12th day of July 1915 at the hour of four o'clock P. M., of said date, in pursuance of the notice and order aforesaid fixing said time and place of settling and signing of said case-made, and of the agreement of parties; and now at said time and place the said appellant, John Kenny, appears by E. R. Hastings and John Embry, his attorneys, and the said appellee, Laban Miles appears by his attorney, H. P. White, and the said appellee, Laban Miles presents said suggestions of amendment to said case-made at page 125 hereof, which said suggestions of amendments have been duly served in time, and said suggestions of amendments are duly considered by the court and disallowed. And I settle and sign the foregoing as a true
148 and correct case-made, and direct that it be attested and filed by the Clerk of said Court.

Witness my hand at Pawhuska in Osage County, Oklahoma, this 12th day of July, 1915.

A. R. MUSELLER,
Special Judge District Court.

[SEAL.]

Attest:
THOS. LEAHY,
Court Clerk.

District Court State of Oklahoma, County of Osage, Pawhuska, Okla. Filed Jul- 12, 1915. Thos. Leahy, Court Clerk.

149 STATE OF OKLAHOMA,
County of Osage, ss:

In the District Court of Osage County, Oklahoma.

No. 2372.

In the Matter of the Estate of LAH-TAH-SAH, Osage Allottee, #256, Deceased, on Appeal from the County Court to the District Court.

Transcript.

EXHIBIT B.

150 In the County Court of Osage County, Oklahoma.

No. 389.

In the Matter of the Estate of LAH-TAH-SAH, Osage Allottee, No. 256, Deceased.

Transcript on Appeal to the District Court.

151 *Petition for Letters of Administration.*

THE STATE OF OKLAHOMA,
Osage County, ss:

In the County Court.

Roll No. —.

In the Matter of the Estate of LAH-TAH-SAH, Osage Allottee, No. 256, Deceased.

Comes now Laban Miles, and shows to the Court that Lah-tah-sah departed this life at Pawhuska, in the County of Osage and State of Oklahoma, on or about the 19th day of August, A. D. 1908.

The said decedent was at the time of his death a resident of Pawhuska, in the County of Osage and State of Oklahoma.

The decedent left estate in the County of Osage and State of Oklahoma. That due search and inquiry has been made to ascertain if decedent left a will but none has been found, and according to the best information and belief of petitioner, said decedent died intestate.

The general character and probable value of the estate left by decedent is as follows: Lands allotted to her as a member of the Osage Tribe of Indians, in Osage County, Oklahoma, amounting to about 660 acres of the approximate yearly rental of $500.00, and tribal trust funds belonging to her as a member of such tribe, and to her credit in the Treasury of the United States, together with oil, gas and other mineral annuities of the approximate yearly income of $600.00.

That the names, ages and residences of the heirs at law of the decedent so far as known to your petitioner, are as follows:
152 Laban Miles, Husband, age 50 years, residence Pawhuska, Oklahoma, John Kenney, Son, age 26 years, residence Fairfax, Oklahoma.

That your petitioner is husband of said decedent and is advised and believes that he is entitled to administer upon said estate. He therefore recommends and requests that John Bird be appointed by the Court as such administrator.

That John Bird for whom letters of administration are herein prayed is a resident of Osage County, State of Oklahoma, with post-office address at Pawhuska, Oklahoma, in said County.

Wherefore, petitioner prays that letters of administration issue to said John Bird.

LABAN MILES, *Petitioner.*

GRINSTEAD, MASON & SCOTT,
Att'ys for Petitioner.

Endorsed on the Back: No. 389. In the Matter of the -state of Lah-tah-sah, Deceased. Petition for letters of administration. Filed in the County Court, Osage County, Okla., this 8th day of July, 1912. J. F. Jones, Clerk County Court.

PAWHUSKA, OKLAHOMA, July 8, 1912.

I hereby acknowledge service of the within petition and the receipt of a true copy thereof, the date first above written.

W. M. PETERSON,
Supervisor in Charge, Osage Agency.

153 *Notice of Application for Appointment of Administrator.*

In the County Court, County of Osage, State of Oklahoma.

In the Estate of LAH-TAH-SAH, Osage Allottee No. 256, Deceased.

The State of Oklahoma to the heirs next of kin, Superintendent of the Osage Agency, and Creditors of the said Lah-tah-sah, Deceased:

You are hereby notified that Laban Miles has applied for letters of administrator of said estate to be granted to John Bird, and that said petition will be heard at the Court room of said Court in the city of Pawhuska, in said County and State, on Thursday, the 8th day of August, 1912, at 9:00 o'clock A. M., at which time you may appear and show cause, if any you have, why said petition should not be granted.

Witness my hand and the seal of said Court hereunto affixed this 9th day of July, 1912.

[SEAL.]

J. F. JONES,
Clerk County Court.

STATE OF OKLAHOMA,
Osage County, ss:

I, the undersigned, do solmenly swear that on the 9th day of July, 1912, I posted true copies of the within notice in three public places in Osage County, as follows, one at the Court House, in the City of Pawhuska, one at old Agency Bldg., Pawhuska, and one at City Hall, Pawhuska.

C. S. COOKSEY.

Subscribed and sworn to before me this 9th day of July, A. D. 1912.

[SEAL.]

C. T. BENNETT,
County Judge.

154 STATE OF OKLAHOMA,
Osage County, ss:

I, the undersigned, do solemnly swear that on the 9th day of July, 1912, I deposited in the postoffice copies of the within notice, postage prepaid, and addressed to John Kinney, at Fairfax, Okla., at their several places of residence, and that said persons are all of the heirs of the within named decedent.

PAUL B. MASON.

Subscribed and sworn to before me, this 9th day of July, 1912.

[SEAL.]

J. F. JONES,
Clerk County Court.

Fees 80¢.

Endorsed on back: No. 389. In the matter of the estate of Lah-tah-sah, Deceased. Notice of application for appointment of administrator. Filed in County Court, Osage Co., Okla., this 9th day of July, 1912. Andrew Joyce, Deputy Clerk County Court.

155 In the County Court of Osage County, State of Oklahoma.

Order for Hearing.

STATE OF OKLAHOMA,
Osage County:

In the Matter of the Estate of LAH-TAH-SAH, Osage Allottee, No. 256, Deceased.

Petition for Letters of Administration.

Now, on this 9th day of July, 1912, Laban Miles, having filed in this Court his petition alleging that Lah-tah-sah died intestate on or about the 19th day of August, 1908, leaving property within the jurisdiction of this Court, and praying for the appointment of John Bird as Administrator of said estate.

It is ordered that said petition be and hereby is set for hearing on the 8th day of August, 1912, at the hour of 9 o'clock A. M., and that notice thereof be given by posting notices of such hearing at three public places in said Osage County, Oklahoma, one of which shall be posted up at the County Court house door of this Court, in the City of Pawhuska, Oklahoma, and two in two other public places, and by mailing a notice, with postage prepaid to each of the heirs at law of said decedent as required by law.

[SEAL.] C. T. BENNETT,
County Judge.

Endorsed on back: No. 389. In the matter of the state of Lah-tah-sah, Deceased. Order for hearing petition for letters of administration. Filed July 9, 1912. J. F. Jones, Clerk County Court. Recorded in Administrator's Record, Book 1, page 420.

156 *Order Appointing Administrator.*

THE STATE OF OKLAHOMA,
Osage County, ss:

In the County Court.

In the Matter of the ESTATE OF LAH-TAH-SAH, Osage Allottee, No. 256, Deceased.

Now, on this 17th day of August, 1912, there coming on for hearing the petition of Laban Miles for the appointment of John Bird, as

administrator of the estate of Lah-tah-sah, Deceased, and petitioner appearing "A" in person and by Grinstead, Mason & Scott, his attorneys, and it being first proven that notice of this hearing has been given by posting of notice for 10 consecutive days in the three public places in Osage County, Oklahoma, one of which was at the County Court house door in the city of Pawhuska, and the last on the 9th day of July, and by mailing copies of said notice on the —— day of —— postage prepaid, addressed to the heirs at law of said decedent, resident of this State, so far as known to petitioner, and the Court having heard the evidence offered in support of said petition "B" * * * and being fully advised in the premises.

It is ordered, That John Bird be and hereby is appointed administrator of the estate of Lah-tah-sah, Deceased, and that letters of Administration issue to said John Bird upon his taking and subscribing the oath required by law, and executing a bond to the State of Oklahoma, in the sum of Fifteen Hundred & No/100 Dollars, with sureties approved by the Judge of said Court as required by law.

[SEAL.] C. T. BENNETT,
County Judge.

Endorsed on back: No. 389. In the Matter of the Estate of Lah-tah-sah, Deceased. Order appointing administrator. Filed Sept. 9" 1912. J. F. Jones, Clerk County Court. Recorded in Administrator's Record Book 1, page 429.

157 *Letters of Administration.*

STATE OF OKLAHOMA,
Osage County, ss:

In the County Court.

In the Matter of the ESTATE OF LAH-TAH-SAH, Osage Allottee, No. 256, Deceased.

John Bird is hereby appointed Administrator of the estate of Lah-tah-sah, Deceased.

Witness: The hand of C. T. Bennett, Judge of the County Court of Osage County, State of Oklahoma, with the seal thereof affixed the 20th day of November, 1912.

[SEAL.] C. T. BENNETT,
County Judge.

STATE OF OKLAHOMA,
Osage County, ss:

I, John Bird, do solemnly swear that I will perform according to law, the duties of Administrator of the estate of Lah-tah-sah, Deceased, so help me God.

JOHN BIRD.

Subscribed and sworn to before me this 14th day of November, 1912.

[SEAL.] S. S. GOEHRING,
Notary Public.

My commission expires March 9, 1916.

Endorsed on back: No. 389. In the Matter of the Estate of Lah-tah-sah, Deceased. Letters of Administration. Filed November 29, 1912. Andrew Joyce, Deputy Clerk County Court. Recorded in Administrator's Record Book 1, page 420.

158 In the County Court of Osage County, Oklahoma, Sitting at Pawhuska.

In the Matter of the ESTATE OF LAH-TAH-SAH, Deceased, Osage Allottee, No. 256.

Notice to Creditors.

All persons having claims against Lah-tah-sah, Osage Allottee, No. 256, deceased, are required to present the same with necessary vouchers to the undersigned Administrator, at his office in the Citizens National Bank of Pawhuska, Oklahoma, within four months of the date hereof, or the same will be forever barred.

Dated Pawhuska, Oklahoma, December 14, 1912.

JOHN L. BIRD,
Administrator.

Endorsed: Received this writ on the 16th day of December, 1912, and executed the same by posting in three public places in Pawhuska, one at Court House door, one at City Hall, one at old Agency Bldg., (within named defendants) this 16 day of Dec. 1912. H. M. Freas, Sheriff. C. S. Cooksey, Deputy. Fee 80c.

Endorsed: No. 389, Estate of Lah-tah-sah, Deceased. Notice of hearing and Proof of Posting. Filed in County Court, Osage Co., Okla., this 16th day of December, 1912. Andrew Joyce, Deputy Clerk County Court.

159 In the County Court.

ESTATE OF LAH-TAH-SAH, Deceased.

We, the undersigned, W. E. Savage, J. W. Soderstrom and John A. Gardner, of the above estate, make and return the following true and correct inventory of all the Real Estate and all the goods, chattels, rights, credits and estate of Lah-tah-sah, Allottee 256, deceased, except the homestead, which have come to my possession or knowledge.

Real Estate.

N.W.¼ Sec. 26, 24, 4, Homestead, App. Value	$2,400.00
East ½ of Section 30, Township 28, Range 9, containing 320 acres, App. Value	960.00
Lot 3, E.½ of S.W.¼, of N.W.¼, S.E.¼ of N.W.¼ of Sec. 4, Township 20, Range 10, containing 100.12 acres	300.00
N.½ of S.E.¼ of Section 4, Township 20, Range 10, containing 80 acres, Appraised value	240.50
All North and East of the Indian Meridian in Osage County, Oklahoma	1,500.00
Total	$2,400.00

Personal Property.

Cash on hand	$ 210.00

160 Dated this 15th day of January, 1914.

JOHN L. BIRD,
Administrator.

Oath of Executor or Administrator.

STATE OF OKLAHOMA,
Osage County, ss:

John L. Bird, being first duly sworn, says. That he is administrator of the estate of Lah-tah-sah, deceased:

That the above inventory by him made contains a true statement of all the estate of said decedent, except the homestead, that has come to his knowledge and possession and particularly all of the moneys belonging to said decedent, and of all just claims of said decedent against Lah-tah-sah.

JOHN L. BIRD,
Administrator.

Subscribed and Sworn to before me this 24th day of January, A. D., 1914.

[SEAL.]

C. E. LAKE,
Notary Public.

My Commission expires Mar. 7, 1915.

In the County Court in and for Osage County, State of Oklahoma.

In the Matter of the ESTATE OF LAH-TAH-SAH, Osage Allottee, 256, Deceased.

Order Appointing Appraisers.

Now, on this 7th day of January, 1914, it is hereby ordered that W. E. Savage, J. W. Soderstrom, John A. Gardner, of Osage County,

State of Oklahoma, be and are hereby appointed appraisers of the estate of Lah-tah-sah, Allottee 256, deceased, within the County of Osage, in said State; and are hereby directed to view and appraise said estate, and make return of said appraisement as provided by law.

[SEAL.] CHARLES R. GRAY,
Special County Judge.

161 STATE OF OKLAHOMA,
Osage County, ss:

I, Belva L. Moore, Clerk of the County Court in and for the county and State aforesaid do hereby certify that the above and foregoing to be a true copy of the original thereof, as the same appears on record in my office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this — day of January, 1914.

[SEAL.] BELVA L. MOORE,
Clerk of the County Court.

Oath of Appraisers.

STATE OF OKLAHOMA,
Osage County, ss:

I, do solemnly swear that I will truly, honestly, and impartially appraise the property exhibited to me as belonging to the estate of Lah-tah-sah, R. No. 256, deceased, according to the best of my knowledge and ability and that I am disinterest- in said estate, So help me God.

J. W. SODERSTROM,
W. E. SAVAGE,
JOHN A. GARDNER,
Appraisers.

Subscribed and sworn to before me this 15th day of Jany. A. D., 1914.

[SEAL.] BELVA L. MOORE,
Clerk C. Court.

Certificate of Appraisers.

We, the undersigned, Appraisers, do hereby certify, that pursuant to the annexed warrant to us directed, we have appraised all the property described and mentioned in the above inventory, which has been to us exhibited, setting down opposite each item in said inventory, in figures, the value in money, as by us determined.

162 Witness our hands, this 15th day of January, A. D., 1914.

J. W. SODERSTROM,
W. E. SAVAGE,
JOHN A. GARDNER,
Appraisers.

Bill of Appraisers.

ESTATE OF LAH-TAH-SAH, Deceased.

To —— ——, Appraisers, Dr.

To compensation for services appraising said Estate, as follows:
One day, at $2.00 per day each $6.00
Necessary disbursements, as follows: Board 4.50

$10.50

STATE OF OKLAHOMA,
Osage County, ss:

J. W. Soderstrom, W. E. Savage, and John A. Gardner, the appraisers within named, being duly sworn, each for himself says, that the foregoing bill of items is correct and just, and that the services have been rendered and expenses incurred as therein set forth.

J. W. SODERSTROM, 3.50
W. E. SAVAGE, 3.50
JOHN A. GARDNER, 3.50
Appraisers.

Subscribed and sworn to before me this 15th day of Jan'y A. D. 1914.

[SEAL.] BELVA L. MOORE,
Clerk County Court.

Endorsed on back: No. 389. General Inventory and Appraisement. In the County Court. County of Osage. In the matter of the estate of Lah-tah-sah, deceased. Filed this 28th day of Jan'y, 1914. Belva L. Moore, Clerk County Court. Service of within paper and receipt of copy thereof, acknowledged this — day of Jan. 1914. James A. Carroll, Supt. Osage Agency, Per F. A. B.

163 *Annual or Final Account of Administrator or Executor.*

STATE OF OKLAHOMA,
Osage County, ss:

In the County Court of said County.

To the Judge of said Court:

To the understand, as the administrator of the estate of Lah-tah-sah, Osage Allottee, No. 256, deceased, respectfully submit the following as a full and correct account and report of his administration as such Admr., from November 20, 1912, to the 23rd day of January, 1914, which account exhibits not only the debts which

have been paid, but also contains a statement of all the debts which have been presented and allowed during the period embraced in this account.

I charge myself with the following, to-wit:

Date Month	Day	Year	Items of Receipts	Total Amount
Dec.	11,	1912	Lease	$240.00
Total amount of moneys received or col.....				$240.00

Contra.

I ask myself to be credited with the following payment to creditors of deceased, as per voucher herewith submitted.

Items Paid Out

Nov. 20, 1912. Premium on surety bond.....$15.00
Nov. 20, 1912. " " " " $15.00

Total amount received.....$240.00
" " paid out..... 30.00

Balance due.....$210.00

(Signed.) JOHN L. BIRD.

STATE OF OKLAHOMA,
Osage County, ss:

John L. Bird, being duly sworn, on oath says, that he has read the foregoing account and report of his administration, as the Admr. of the estate of Lah-tah-sah, Osage Allottee 256, deceased, 164 and knows the contents thereof, and that the same are true and correct.

JOHN L. BIRD.

Subscribed and sworn to before me, this 24th day of Jan'y, 1914.
[SEAL.] D. F. LAKE,
Notary Public.

My commission expires March 7, 1915.

* * * * * * *

Your administrator (executor) further reports that the debts and claims against said estate have all been paid, leaving the above balance to be distributed between the parties lawfully entitled thereto. Your administrator therefore petitions the Court to determine and find the heirs of said estate, which he is informed and believes to be the following named persoa *dne* entitled to said estate as follows:

Laban Miles, surviving husband, one-half.
John Kenney, son, one-half.
and moves the Court that said heirs be determined and * * *

be allowed to make distribution of said estate, and take receipts therefor, and present the same to the Court and be discharged; all of which is respectfully submitted.

JOHN L. BIRD.

Subscribed and sworn to before me this 24th day of January, A. D. 1914.

[SEAL.]

C. F. LAKE,
Notary Public.

My commission expires Mar. 7, 1915.

Statement of Claims Presented and Allowed.

Name of Creditor:	Nature of Claim:	Amount, Etc:
—— ——	None.	——

Total amount of claims allowed.....None

Very respectfully submitted, this 24- day of Jan. 1914.

JOHN L. BIRD,
Administrator.

Endorsed on back: No. 389. Annual or Final Account of Administrator or Executor. In County Court of Osage County, Oklahoma. In the matter of the estate of Lah-tah-sah, deceased. Final account of John L. Bird, Admr. Filed Jan'y 28, 1914. Belva L. Moore, Clerk. Service of within account and receipt of copy thereof acknowledged this 15th day of Jan., 1914. James A. Carroll, Supt. Osage Agency. Per F. A. B.

165 In the County Court of Osage County, Oklahoma.

In the Matter of the ESTATE of LAH-TAH-SAH, Deceased.

Comes now John Kinney, son of the decedent, and alleges that he is the sole and only heir at law of said Lah-tah-sah; that he is the son of such decedent; that Laban Miles is not an heir of said decedent, and this said John Kinney objects and excepts to the final report of the administrator herein in that said report suggests that Laban Miles is an heir of such decedent, when in truth and in fact he is not.

Wherefore, the said John Kinney prays that this court inquire, ascertain and determine that the said Laban Miles is not an heir and has no interest in said estate; and that said John Kinney is the sole and only heir and that the whole of said estate be distributed to him and that said report be amended accordingly.

JOHN KINNEY,
By JOHN EMBRY,
His Attorney.

Endorsed: Filed Feb. 28, 1914. Belva L. Moore, Clerk County Court.

Service accepted this 28th day of Feb., 1914.

JAMES A. CARROLL,
Supt. Osage Agency.
By F. A. BAKER.

166 STATE OF OKLAHOMA,
Osage County, ss:

In County Court.

In the Matter of the ESTATE OF LAH-TAH-SAH, Osage Allottee, No. 256, on Hearing of Final Account of Administrator.

Plea of Res Adjudicata.

Comes now Laban Miles and alleges and states that on the 25th day of April, 1913, the District Court of Osage County, Oklahoma rendered a judgment in the case of Laban Miles, plaintiff, versus John Kenny, defendant, in case No. 1896 in said Court, by which judgment the heirs of the estate of Lah-tah-sah, Osage Allottee No. 256, deceased, were ascertained and determined. A copy of said judgment is hereto attached, marked "Exhibit A" and made part hereof; that in said judgment the validity of the marriage of said Laban Miles and said Lah-tah-sah, deceased, was adjudicated; that the time during which an appeal might have been taken from said judgment of the District Court has long since expired; that no appeal from said judgment has been taken; that said John Kenny appeared in person and by Hargis & Conwall, his attorneys, at the trial in the above entitled cause wherein said judgment was rendered and participated in the trial thereof, which said trial extended over a period of five days and many witnesses were called by each of the respective parties, and much evidence offered and submitted by the respective parties upon which said judgment was based and rendered. That said Laban Miles and John Kenny are the only parties claiming any interest in said estate. That the subject-matter involved in the District Court judgment was the same as that herein involved as relating to the validity of marriage and determination of ownership; that on Sept. 12, 1908, M. L. Garrett was appointed Administrator of the estate of said Lah-tah-sah, de-
167 ceased, and fully administered upon the estate, paid all debts and was discharged as such administrator on April 5, 1910.

By reason whereof said Laban Miles alleged that the matter of the determination of the legal heirs of said Lah-tah-sah, deceased, has been fully adjudicated and all matters and claims relating thereto have become and are res adjudicata, and said Laban Miles pleads the same as a bar to the readjudication thereof by this Court and alleges that this court has no jurisdiction thereof.

WHITE & WIDDOWS,
Att'ys for Laban Miles.

168 (EXHIBIT "A.")

In the District Court in and for Osage County, Oklahoma.

No. 1896.

LABAN MILES, Plaintiff,

vs.

JOHN KENNY, Defendant.

Journal Entry.

On the 25th day of April, 1913, same being a regular judicial day of the March 1913 term of said Court, the above entitled cause came on for hearing in its regular order, pursuant to agreement of the parties, before R. B. Boone, Special Judge agreed upon by the parties. The plaintiff appearing in his own proper person and by White & Widdows, his attorneys, and the defendant appearing in his own proper person and by Hargis & Conwell, his attorneys, and all parties waiving trial by jury and announced ready for trial by the Court. And thereupon the plaintiff began introduction of his testimony and said cause was on trial in said court before said Special Judge, all parties being present in their own proper persons and by their attorneys, as hereinabove set forth on the 25th, 26th day of April, 1913, and on the 26th day of April the trial was adjourned to the 29th day of April, 1913, at noon, at which time said trial was resumed before said Special Judge, all parties being present in their own proper persons and by their attorneys, and continued on trial from noon of April 29th to May 2nd inclusive, during which said time the plaintiff introduced his testimony and rested and the defendant introduced his testimony and rested, and thereupon the plaintiff offered his testimony in rebuttal and rested. And the Court after examination of the pleadings and hearing the arguments of Counsel in behalf of the respective parties, took the case under advisement pursuant to consent and agreement of counsel of the respective parties and stipulation of counsel for both parties filed in said cause; and

169 Now on this 24th day of May, 1913, after due consideration of all the evidence and arguments of counsel and being fully advised in the premises, the court finds the following facts:

That in September, 1907, the Plaintiff, Laban Miles, after having been divorced from his former wife, Wah-shah-she-me-tsa-he, according to Osage Indian custom, entered into an agreement with Lah-tah-sah whereby he and Lah-tah-sah agreed to become man and wife. That both were full-blooded members of the Osage Indian Tribe and unmarried at the timei. That they thereupon accumed the marriage relation and continued to sustain that relation up to the time of Lah-tah-sah's death on August 19th, 1908, a period of eleven months. That the morning after they assumed such relationship,

the defendant, John Kenny, the son of Lah-tah-sah, by a former husband, received a horse given away by Hlu-ah-wah-tah, the brother-in-law of plaintiff, Laban Miles, in honor of the marriage of Laban Miles and Lah-tah-sah, in accordance with Osage Indian custom, which horse defendant sold, appropriating the money to his own use. That on said morning other presents were given in accordance with the custom of Osage Indians at the marriage of Indians of the age of Laban Miles and Lah-tah-sah, and who had been theretofore married. That a feast was given in honor of said marriage on the morning after Laban Miles brought Lah-tah-sah to his home, but neither Laban Miles nor Lah-tah-sah, were at said feast. They Laban Miles and Lah-tah-sah went to the Osage Indian Agent and had themselves enrolled as man and wife, and a trading card was issued to Laban Miles on his own and Lah-tah-sah's quarterly annuities and payments. That Laban Miles and Lah-tah-sah were recognized by the Indians with whom they associated as man and wife until Lah-tah-sah's death. They were also so recognized during this time by the Osage Indian Agency and the Interior Department.

That after assuming said relationship in September, 1907,
170 they signed various papers to borrow money as man and wife, and held themselves out as such and were so recognized by those who dealt with them in a business way.

Conclusions of Law.

That Plaintiff, Laban Miles, and Lah-tah-sah, Osage Allottee No. 256, were husband and wife at the time of the death of said Lah-tah-sah; that plaintiff, Laban Miles, is the surviving husband of said Lah-tah-sah, and as such is the owner of an undivided one-half interest in and to the lands described in plaintiff's petition.

The court further finds that Lah-tah-sah, Osage Allottee No. 256, died intestate on or about the 19th day of August, 1908, leaving an estate consisting in part of the lands described in plaintiff's petition.

The Court further finds that the plaintiff, Laban Miles, and defendant, John Kenny, above named are the only heirs at law of said Lah-tah-sah, deceased, and as such plaintiff Laban Miles owns an undivided one-half interest, and the defendant John Kenny owns an undivided one-half interest in and to the lands allotted and deeded to said Lah-tah-sah, described in plaintiff's petition, to wit:

N.W.¼ of Section 36, Township 24, Range 4, N.E.¼ of Section 30, Township 28, Range 9, S.E.¼ of Section 30, Township 28, Range 9; Lot 3, E.½ of S.W.¼ of N.W.¼, S.E.¼ of N.W.¼, N.½ of S.E.¼ of Section 4, Township 20, Range 10, all north and east of the Indian Base and Meridian in Osage County, Oklahoma.

The court further finds that no part of the lands described was ever used, occupied or claimed by said Lah-tah-sah, deceased, or any of the parties to this action as a homestead, and that no part of same was the homestead of said Lah-tah-sah, or any of the parties to this action. The court further finds that the parties hereto have been unable to agree upon a partition or division of said lands.

171 It is therefore ordered, adjudged and decreed by the Court that the plaintiff, Laban Miles, and the defendant, John Kenny, are the owners in common of the lands described, and their respective interests and ownership herein is as follows:

Laban Miles, Plaintiff, Osage Allottee No. 507, an undivided one-half; John Kenny, Defendant, Osage Allottee No. 2857, an undivided one-half; and that the shares of the aforesaid parties and their respective interests in the lands above described as above set forth, be and the same are hereby confirmed. It is further ordered, adjudged and decreed by the Court that partition of said lands be made accordingly; that W. T. Mosier, J. W. Soderstrom and W. E. Savage are hereby appointed commissioners to make partition of said property among the parties according to their respective interests as herein fixed and determined, if such partition can be made without manifest injury. But if such partition cannot be made, the commissioners herein named shall make a valuation and appraisement of the property herein described and make a report of their proceedings to the Court.

R. B. BOONE,
Special Judge.

Endorsed: Filed this the 28th day of Feb. 1914. Belva L. Moore, Clerk of the County Court.

Service of within paper and receipt of a true copy thereof is hereby acknowledged this 28th day of Feb. 1914.

W. P. HAYGOOD,
Ass't Supt. Osage Indian School.

172 In the County Court of Osage County, Oklahoma.

In the Matter of the ESTATE OF LAH-TAH-SAH, Osage Allottee, #256, Deceased.

Demurrer of John Kenny.

Comes now John Kenny and demurs to the plea of res adjudicata and hearing on final account, filed by Laban Miles, for the reasons following:

1. The District Court of Osage County, Oklahoma, rendering the findings and judgment therein pleaded was without jurisdiction to render a final binding judgment therein.

2. The former administration pleaded was invalid for the Court had no jurisdiction of the persons or subject matter, and said Laban Miles is estopped from pleading same.

3. Said plea does not state facts entitling said Laban Miles to any right or relief—all as appear from said plea.

EMBRY & HASTINGS,
Att'ys for John Kinny.

Endorsed: Filed Feb. 28, 1914, Belva L. Moore, Clerk County Court.

Service acknowledged this 28th day of Feb. 1914.

JAMES A. CARROLL,
Supt. Osage Agency.
By F. A. BAKER.

173 STATE OF OKLAHOMA,
Osage County, ss:

In the County Court.

In the Matter of the ESTATE OF LAH-TAH-SAH, Osage Allottee # 256, Deceased.

Journal Entry.

Now on this 28th day of February, 1914, the above entitled matter came on for hearing and settlement of final account of administrator and determination of heirs, pursuant to order of Court made and entered on the 28th day of January, 1914, pursuant to due and legal notice. Claimant, John Kenny, appearing by John Embry, his attorney, filed his objections to the final account of the administrator and claiming to be the sole heir of Lah-tah-sah, deceased, and that the whole of said estate be distributed to him, and asked that said report be amended accordingly. Thereupon the claimant, Laban Miles, appeared by White and Widdows, his attorneys, and filed a plea of res adjudicata as to the determination of heirs, with copy of judgment rendered in the District Court of Osage County, Oklahoma, in cause No. 1896, wherein Laban Miles was plaintiff and said John Kenny defendant. Thereupon said John Kenny by his attorney, John Embry, filed a demurrer to said plea of res adjudicata. And the Court having heard the argument of counsel and being fully advised in the premises finds that said demurrer should be overruled.

It is therefore ordered, adjudged and decreed that said demurrer be and the same hereby is by the Court overruled. To which ruling of the Court the said John Kenny objects and excepts, which objections and exceptions are by the Court allowed, and said John Kenny is given till and on March 12, 1914, to answer said plea.

It is further ordered by the Court that the above entitled matter be and the same hereby is continued to the 14th day of
174 March, 1914, at 9 A. M. for further hearing on settlement of said final account.

[SEAL.]

CHAS. R. GRAY,
Special Judge.

O. K.
WHITE & WIDDOWS,
Att'ys for Laban Miles.

O. K.
EMBRY & HASTINGS,
Att'ys for John K.

Endorsed: Filed Mar. 14, 1914. Belva L. Moore, Clerk County Court.

175 In the County Court in and for Osage County, State of Oklahoma.

In the Matter of the ESTATE OF LAH-TAH-SAH, Osage Allottee No. 256, Deceased, on Hearing of Final Account of Administrator.

Answer of John Kenny.

Comes now John Kenney and answering the plea of res adjudicata filed herein by Laban Miles, denies each and every allegation therein contained, except such as herein expressly admitted.

(2) For further answer, this John Kenny denies that said Laban Miles was ever married to decedent, or became or is the husband or heir of decedent.

(3) And further answering, John Kenney, alleges:

(*a*) That said previous administration was a nullity and of no effect, as the Court was without jurisdiction, and the said Laban Miles, having petitioned for this administration, is estopped to plead any previous administration.

(*b*) That the District Court rendering the judgment set up in said plea and referred to as the action between Laban Miles, plaintiff, and John Kenney, defendant, was without jurisdiction to hear or determine the same or to render any judgment therein, that the lands therein described were the restricted lands and allotments of the decedent, and that the decedent was a full blood Osage allottee who had not received a certificate of competency.

(*c*) That said decedent, said Laban Miles and said John Kenny are and were members of the Osage Tribe of Indians, of the full blood, residing in Osage County, Oklahoma, neither of whom

176 have received a certificate of competency, and all of whom were and are incompetent Indians; and the Secretary of the Interior refused and failed to confirm or approve said judgment and proceedings of said District Court, and the same is void and of no effect.

EMBRY & HASTINGS,
Attorneys for John Kenney.

Endorsed: Service accepted this 12th day of March, 1914. James A. Carroll, Superintendent, Per F. A. B.

Endorsed: Filed Mar. 12, 1914. Belva L. Moore, Clerk County Court.

177 In the County Court of Osage County, State of Oklahoma.

In the Matter of the ESTATE OF LAH-TAH-SAH, Osage Allottee, No. 256, Deceased, on hearing of Final Account of Administrator.

Motion.

Comes now Laban Miles, by White & Widdows, his attorneys, and moves the Court to strike all that part and the parts of the answer of John Kenney to the Plea of Res Adjudicata of Laban Miles, designated as (2), (3), and (a), (b), and (c), for the following reasons:

First: That each and all of said matters so designated in said answer are Res Adjudicata and have been passed on by this Court in the ruling on the Demurrer of said John Kenny to said Plea of Res Adjudicata.

Second: For the reasons that said matters and things designated as herein above stated are surplusage and incumbrance of the record and said John Kenny is precluded by the Plea of Res Adjudicata from introducing any evidence in support of any allegation therein contained.

WHITE & WIDDOWS,
Attorneys for Laban Miles.

Endorsed: Filed Mar. 14, 1914, Belva L. Moore, Clerk County Court.

Service of within paper and receipt of a true copy thereof is hereby acknowledged this 14 day of March, 1914.

JAMES A. CARROLL,
Supt. Osage Indian School,
Per N. R.

178 STATE OF OKLAHOMA,
County of Osage:

In the County Court.

In the Matter of the ESTATE OF LAH-TAH-SAH, Osage Allottee, No. 265, Deceased.

Journal Entry.

Now on this 14th day of March, 1914, the above entitled matter coming on for hearing upon motion of Claimant, Laban Miles, to strike that part of the answer of John Kenny, to the plea of res adjudicata, designated as (2), (3), and (a), (b) and (c), and the Court having heard the argument of counsel and being fully advised in the premises finds that said motion should be sustained as to

that part of said answer designated as "(2)" and overruled as the parts designated as "(3)", and "(a)", "(b)", and "(c)".

It is therefore ordered, adjudged and decreed by the Court that said motion be and the same hereby is sustained as to that part of said answer designated as "(2)", and overruled as to that part of said answer designated as "(3)", and "(a)", "(b)" and "(c)", and to part sustained the said John Kenny excepts, and to the parts overruled the said Laban Miles excepts.

[SEAL.] CHAS. R. GRAY,
Special Judge.

Endorsed: Filed Mar. 16, 1914, Belva L. Moore, Clerk County Court. Recorded in P. J. 3—Pages 334 and 335.

179 STATE OF OKLAHOMA,
County of Osage, ss:

In the County Court.

In the Matter of the ESTATE OF LAH-TAH-SAH, Osage Allottee, No. 256, Deceased.

Journal Entry.

Now on this 14th day of March, 1914, the above entitled matter coming on for hearing before Chas. R. Gray, Special Judge, pursuant to continuance as per Journal Entry in said matter made and rendered on the 28th day of February, 1914; claimant, Laban Miles, appearing by White & Widdows, his attorneys; and claimant, John Kenney, appearin*b* by John Embry and A. S. Sands, his attorneys, and further appearing in his own proper person; and the Court having heard the evidence and the arguments of counsel, and being fully advised in the premises finds:

That the final account rendered by John L. Bird, administrator of the estate of said Lah-tah-sah, deceased, is true and correct, that said administrator has made no profit out of said estate and has made disbursements as stated in said accounts, and statement of disbursements since rendition of said final account, and that said disbursements should be approved.

The Court further finds that the Administrator is entitled to the sum of $12.00 as commission on amount of money belonging to said estate received and accounted for by said administrator.

The Court further finds from the evidence that the sole and only heirs of said Lah-tah-sah, deceased, are Laban Miles, surviving husband, and John Kenny, the only issue of said Lah-tah-sah, deceased, and that upon her death the entire estate of said Lah-tah-sah, deceased, descended in equal shares to said Laban Miles and said John Kenny, to wit: An undivided ½ to each.

180 It is therefore ordered, adjudged and decreed by the Court that the final account of John L. Bird, administrator of said estate, be, and the same hereby is, by the Court approved, and that

said John L. Bird, deduct from the money in his hands, belonging to said estate, the sum of $12.00 as compensation for services rendered as administrator in said estate, and file a receipt therefor, in this Court; that said administrator pay the Court costs now due and unpaid, out of the money in his hands, belonging to said estate, and file receipt therefor in this Court.

It is further ordered, adjudged and decreed by the Court, that the sole and only heirs of Lah-tah-sah, deceased, are Laban Miles, surviving husband, and said John Kenny, the only issue of said Lah-tah-sah, deceased; that upon the death of said Lah-tah-sah, deceased, her entire estate descended in equal shares to said Laban Miles and said John Kenny, to wit: an undivided ½ thereof to each, and that upon the payment of costs and administration fees, as herein above provided, said administrator pay the remainder of the money now in his hands belonging to said estate, one-half to said Laban Miles, and one-half to said John Kenny, and take their receipt therefor and file same in this Court and thereupon be discharged. To all of which findings and judgment of the court said John Kenny excepts and upon his request the Court fixes appeal bond at Three Hundred Dollars.

[SEAL.]

CHAS. R. GRAY,
Special Judge.

O. K.
WHITE & WIDDOWS,
Att'ys for Laban Miles.

O. K.
JOHN EMBRY,
Att'y for John Kenny.

Endorsed: Filed this the 16 day of March 1914. Belva L. Moore, Clerk of the County Court. Recorded in P. J. 3—Pages 335 and 336.

181 In the County Court of Osage County, Oklahoma.

In the Matter of the ESTATE OF LAH-TAH-SAH, Roll No. 256, Deceased.

Motion for New Trial.

Comes now the said John Kenny, as heir at law of said deceased, and moves the court to vacate and set aside the final orders, decree and judgment herein rendered on the 14th day of March, 1914, and grant a new trial, for the following causes, which effect materially the substantial rights of the said John Kenny, as heir of said deceased:

1. Irregularity in the proceedings of the Court, by which said party was prevented from having a fair hearing and trial.

2. Irregularities in the proceedings of the prevailing party, Laban Miles, by which the said party, John Kenney, was prevented from having a fair trial.

3. Irregularity in the orders of the Court by which said party, John Kenney, was prevented from having a fair trial.

4. Misconduct of the prevailing party, Laban Miles.

5. Accident and surprise, which ordinary prudence could not have guarded against.

6. Excessive awards and allowances and interests in said estate assigned the prevailing party, Laban Miles, appearing to have been given under the influence of passion or prejudice.

7. Error in the assignment of the amount of recovery by Laban Miles.

8. That the decision and decree of the Court is not sustained by sufficient evidence.

9. That the decision, decree, and final orders of the Court are contrary to law.

182 10. Error of law occurring at the trial, and excepted to by the party making this application, John Kenney.

11. Error of the Court in overruling the demurrer of John Kenney to the plea of res adjudicata of Laban Miles.

12. Error of the Court in sustaining the motion of Laban Miles, to strike from the pleading of John Kenney, parts thereof, including paragraph 2.

13. Error of the Court in sustaining the plea of res adjudicata set up and plead herein by Laban Miles.

14. Error — the Court in refusing to admit the testimony of John Kenney, and other witnesses offered to show that Laban Miles was not married to the deceased; was not a husband of the deceased, and is not entitled to share in said estate or its assetts.

15. The court erred in refusing to hear testimony and admit evidence for the purpose of determining the legal heirs of said deceased.

16. The court erred in holding that the heirs at law of said deceased had been legally determined by a court of competent jurisdiction.

17. The court erred in sustaining the oral motion of Laban Miles, to order and decree an approval of the accounts of the Administrator herein, and a distribution of the assets of said estate.

18. The court erred in admitting evidence in support of the plea of Laban Miles, setting forth a prior adjudication and determination by the District Court of said County of the heirs of said deceased, and holding that Laban Miles is entitled to participate in the assets of the estate.

EMBRY & HASTINGS AND
A. S. SANDS,
Attorneys for John Kenney.

Endorsed: Filed Mar. 17, 1914. Belva L. Moore, Clerk County Court.

183 In the County Court of Osage County, Oklahoma.

In the Matter of the ESTATE of LAH-TAH-SAH, Osage Allottee, No. 256, Deceased.

Journal Entry.

This cause coming on to be heard this 19th day of March, 1914, one of the judicial days of the January, 1914, term of said court, upon the Motion for New Trial of John Kenney, as heir of said deceased, and all parties interested being represented by their respective attorneys, after presentation of said Motion and examination of the same by the Court, and the Court being fully advised in the permises, the said Motion is by the Court overruled and denied, to which ruling the said John Kenny in open court duly excepts, and said exception is by the Court allowed.

CHAS. R. GRAY,
Special Judge of County Court in Probate.

O. K.
WHITE & WIDDOWS,
Attorneys for Laban Miles.

O. K.
EMBRY & HASTINGS AND
A. S. SANDS,
Attorneys for John Kenny.

Endorsed: Filed Mar. 21, 1914. Belva L. Moore, Clerk County Court. Recorded in P. J. 3—pages 340 and 341.

184 In the County Court of Osage County, Oklahoma.

In the Matter of the ESTATE of LAH-TAH-SAH, Osage Allottee, Roll No. 256, Deceased.

Appeal Bond.

Whereas, on March 14th, 1914, in the Matter of the Estate of Lah-tah-sah, Osage Allottee, No. 256, deceased, pending in the County Court of Osage County, Oklahoma, upon the final report of the administrator, and for the settlement of such final account, and for distribution of said estate, and upon the pleadings and issues therein between Laban Miles and John Kenney, contesting claimants, the said Laban Miles by the judgment and consideration of said court was adjudged to be one of the heirs of said Lah-tah-sah, deceased, and entitled to one-half interest in said estate, and to receive one-half of the money in the hands of the administrator, after payment of costs and fees of administration, and the administrator's account being also settled in said decree; and,

Whereas, said John Kenney has appealed therefrom to the District Court of said Osage County, upon both questions of law and fact, and the Judge of said County Court having fixed the amount of said appeal bond at $300.00,

Now, therefore, we, John Kenney, as principal, and F. W. Farrar, residing at Pawhuska, Oklahoma, and Necia Kenney, residing at Fairfax, Oklahoma, hereby undertake and bind themselves to the State of Oklahoma, in the full sum of $300.00 that the appellant, John Kenney, will prosecute his appeal with due diligence to a determination, and will abide, fulfill and perform whatever judgment, decree or order may be rendered against him in that proceeding by the District Court, and that he will pay all damages which
185 the opposite party may sustain by reason of such appeal, together with all costs that may be adjudged against him.

Witness our hands this 14- day of March, 1914.

JOHN KENNEY.
F. W. FARRAR.
NECIA KENNEY.

The above undertaking filed and the same and sureties thereon approved this 20" day of March, 1914.

CHAS. R. GRAY,
Special Judge County Court, Osage County, Oklahoma.

STATE OF OKLAHOMA,
County of Osage, ss:

F. W. Farrar and Necia Farrar, being duly sworn, each for himself says that he is one of the sureties on the foregoing bond, and that he is worth in property, subject to execution the sum of $600.00 over and above his debts, liabilities and exemptions.

F. W. FARRAR.
NECIA KENNEY.

Subscribed and sworn to before me this 15" day of March, 1914.

WILLIAM A. DANIELS,
[SEAL.] *Notary Public.*

My commission expires Oct. 9, 1916.

Endorsed: Filed March 21, 1914. Belva L. Moore, Clerk County Court.

186 STATE OF OKLAHOMA,
County of Osage, ss:

In the County Court of Osage County, Oklahoma.

In the Matter of the ESTATE of LAH-TAH-SAH, Osage Allottee, No. 256, Deceased.

To John Bird, Administrator, Laban Miles, Claimant, and White & Widdows, his attorneys of record, and the Judge of said Court, and Hon. Chas. R. Gray, Special Judge in said cause and court, and all persons interested in the above-entitled estate:

Notice is hereby given that John Kenny, heir at law of Lah-tah-sah, Osage Allottee No. 256, Deceased, and claimant to the estate of said decedent, appeals to the District Court of Osage County, Oklahoma, on both question of law and fact, from the County Court of Osage County, Oklahoma, and the judgment rendered in said Court, in the above-entitled matter, by the Hon. Chas. R. Gray, Special Judge, on, to-wit: March 14, 1914, finding that the said Laban Miles is the surviving husband and heir of the said Lah-tah-sah, deceased, and distributing to the said Laban Miles one-half of the estate of the said Lah-tah-sah, deceased, which said judgment and order, omitting the formal parts, is in substance as follows, to-wit:

"Now on this 14th day of March, 1914, the above-entitled matter coming on for hearing before Chas. R. Gray, Special Judge, pursuant to continuance as per Journal Entry in said matter made and rendered on the 28th day of February, 1914, Claimant Laban Miles, appearing by White & Widdows, his attorneys, and Claimant John Kenney appearing by John Embry and A. S. Sands, his attorneys, and further appearing in his own proper person;
187 and the Court having heard the evidence and the argument of counsel, and being fully advised in the premises, finds:

That the final account rendered by John L. Bird, administrator of the estate of said Lah-tah-sah, deceased, is true and correct, and that said administrator has made no profit out of said estate and has made disbursements as stated in said account, and statement of disbursements since rendition of said final account, and that said disbursements should be approved.

The court further finds that the administrator is entitled to the sum of $12.00 as commission on amount of money belonging to said estate received and accounted for by said administrator.

The Court further finds from the evidence that the sole and only heirs of said Lah-tah-sah, deceased, are Laban Miles, surviving husband, and John Kenney, the only issue of said Lah-tah-sah, deceased, and that upon her death the entire estate of said Lah-tah-sah, deceased, descended in equal shares to said Laban Miles and said John Kenney, to-wit: an undivided one-half to each.

It is therefore ordered, adjudged and decreed by the Court that the final account of John L. Bird, administrator of said estate, be, and the same is hereby, by the Court, approved, and that said John

L. Bird deduct from the money in his hands belonging to said estate the sum of $12.00 as compensation for services rendered as administrator in said estate, and file a receipt therefor in this Court; that said administrator pay the court costs now due and unpaid, out of the money in his hands, belonging to said estate and file a receipt therefor in this Court.

It is further ordered, adjudged and decreed by the court that the sole and only heirs of Lah-tah-sah, deceased, are Laban Miles,
188 surviving husband, and said John Kenney, the only issue of said Lah-tah-sah, deceased; that upon the death of the said Lah-tah-sah, deceased, her entire estate descended in equal shares to said Laban Miles and said John Kenney, to-wit: an undivided one-half thereof to each, and that upon the payment of costs and administration fees, as herein above provided, said administrator pay the remainder of the money now in his hands belonging to said estate, one-half to said Laban Miles, and one-half to said John Kenney, and take their receipt therefor and file same in this Court and thereupon be discharged.

To all of which findings and judgment of the Court, said John Kenney excepts, and upon his request the Court fixes the appeal bond at Three Hundred ($300.00) Dollars.

Second.

And appeals to said District Court from the subsequent order of said County Court, overruling motion for new trial in said cause.

Third.

And appeals to said District Court from the previous order of said County Court, on towit: February 28, 1914, overruling demurrer of said John Kenney to the plea of res adjudicata filed in said matter and cause by said Laban Miles, and upon said question of law the said John Kenney will rely principally upon the grounds that the findings, judgment and decree of the District Court of Osage County, Oklahoma, in the case of Laban Miles vs. John Kenney, defendant, a copy of which is attached to said plea of res adjudicata, is not res adjudicata of the issues therein involved and does not estop the said John Kenney from disputing the findings, and judgments therein contained, and that the said Lah-tah-sah, John Kenney, and Laban Miles, were, and are full blood, incompetent Osage Indians,
189 members of the Osage Tribe of Indians, residing in Oklahoma, to whom no certificates of competency have ever been issued, and that said judgment and decree was an attempt to partition the restricted allotments and lands of the said Lah-tah-sah, deceased, and the said findings, judgment and proceedings have never been approved by the Honorable Secretary of the Interior.

Fourth.

And appeals to said District Court from the previous order of the said Hon. Chas. R. Gray, Special Judge, rendered on, to-wit: March

14, 1914, striking out of the second paragraph of the answer of the said John Kenney, and that the said John Kenney on said question, intends to rely principally upon the grounds that the said Laban Miles was not married to said deceased, and did not become, and is not the husband or heir of said decedent, and that the said John Kenney is entitled to introduce proof to show that the said Laban Miles was never married to the decedent, and was not the husband of the decedent, and is not an heir of the decedent.

That the said judgments and orders made and rendered in said County Court by the said Special Judge thereof, directed the distribution of the estate, and part of the estate of the said Lah-tah-sah, deceased, and were judgments, decrees and orders of said court affecting the substantial rights of this said appellant, John Kenney.

And said John Kenney will ask a trial de novo in said District Court, to the end that he may be decreed the sole heir of said decedent, and that the whole of said estate be distributed to him.

JOHN KENNEY,
By JOHN EMBRY,
Attorney for John Kenney.
A. S. SANDS,
EMBRY & HASTINGS,
Attorneys for John Kenney.

Service of the foregoing and a copy thereof acknowledged and received this 20th day of March, 1914

WHITE & WIDDOWS,
Attys. for Laban Miles.
CHAS. R. GRAY,
JOHN L. BIRD.

Endorsed: Filed Mar. 21, 1914, Belva L. Moore, Clerk County Court.

190 STATE OF OKLAHOMA,
County of Osage, ss:

In the County Court.

Certificate of Appeal.

I, Chas. R. Gray, Judge of said County Court, in the above entitled cause do hereby certify that the within and foregoing is a full, true and correct transcript and copy of the Appeal Bond, Notice of Appeal, Judgment and Decree appealed from, and of the minutes, records and papers and proceedings in said cause, as the same appears of record in this office.

Cost of transcript $6.50, due County Court.

[SEAL.]

CHAS. R. GRAY,
Special Judge of Said Court.

Attest:
BELVA L. MOORE,
Clerk of Said Court.
[SEAL.]

Endorsed: District Court, State of Oklahoma, County of Osage. Filed Apr. 1, 1914, Thos. Leahy, Jr., Clerk District Court, by A. B. Cotter, Deputy.

191 STATE OF OKLAHOMA,
County of Osage, ss:

In the District Court of Osage County, Oklahoma.

No. 2372.

In the Matter of the ESTATE OF LAH-TAH-SAH, Osage Allottee, #256, Deceased, on Appeal from the County Court to the District Court.

Motion to Dismiss Appeal.

Comes now Laban Miles, Osage Allottee No. 507, a party in interest and moves the court to dismiss the above entitled matter and the appeal thereof for the following reasons:

1st. That the court has no jurisdiction of the subject matter involved.

2nd. That the District Court has no appellate jurisdiction in probate matters wherein the decedent at the time of death was an enrolled Osage Indian to whom no certificate of competency had been issued.

3rd. That the court has no jurisdiction to change, modify, affirm or reverse the decision and judgment of the County Court rendered in the above matter, determining and ascertaining the legal heirs of said Lah-tah-sah, deceased, for the reason that by an act of Congress approved April 18th, 1912, (Public No. 125), provided that the property of deceased Osage Allottees shall, in probate matters be subject to the jurisdiction of the County Court.

H. P. WHITE,
Attorney for Laban Miles.

Endorsed: Filed this the 1st day of March, 1915. Thos. Leahy, Clerk of the Dist. Court, by Eula B. Foley, Deputy Clerk.

192 STATE OF OKLAHOMA,
County of Osage:

In the District Court of Osage County, Oklahoma.

No. 2372.

In the Matter of the ESTATE OF LAH-TAH-SAH, Osage Allottee, #256, Deceased, on Appeal from the County Court to the District Court.

Now on this 1st day of March, 1915, the same being a regular judicial day of the March, 1915, term of said court, the Hon. R. H.

Hudson, District Judge of the Twenty-Fourth Judicial District being disqualified to serve as such in the above entitled cause by reason of having been of counsel for one of the parties and in lieu of an election to elect a special judge, the parties to the above mentioned matter by their respective attorneys agree that A. R. Museller be and he hereby is agreed upon as special judge to try the issues in the above entitled matter with like jurisdiction as the regular judge in such cases. And it is agreed his power as such special judge continue from term to term until the appeals in this case are perfected if any be taken.

JOHN EMBRY,
Attorney for John Kenney.
H. P. WHITE,
Attorney for Laban Miles.

Endorsed: Filed this the 1st day of March, 1915. Thos. Leahy, Clerk of the Dist. Court, by Eula B. Foley, Deputy Clerk.

193 STATE OF OKLAHOMA,
County of Osage, ss:

In the District Court of Osage County, Oklahoma.

No. 2372.

In the Matter of the ESTATE OF LAH-TAH-SAH, Osage Allottee, #256, Deceased, on Appeal from the County Court to the District Court.

Oath of Special Judge.

I, A. R. Museller, do solemnly swear that I will support, obey, and defend the Constitution of the United States, and the Constitution of the State of Oklahoma, and will discharge the duties of my office as Special Judge in the above entitled matter with fidelity; that I have not paid, or contributed, either directly or indirectly, any money or other valuable thing, to procure my nomination, election or appointment; that I have not, knowingly, violated any election law of the State, or procured it to be done by others in my behalf; that I will not, knowingly, receive, directly or indirectly, any money or other valuable thing, for the performance or non-performance of any act or duty pertaining to my office, other than the compensation allowed by law, and I further swear that I will not receive, use or travel upon any free pass or on free transportation during my term of office.

A. R. MUSELLER.

Subscribed and sworn to before me this 8th day of March, 1915.
[SEAL.] THOS. LEAHY, *Court Clerk.*
By EULA B. FOLEY, *Deputy.*

Endorsed: Filed Mar. 8, 1915. Thos. Leahy, Court Clerk.

194 STATE OF OKLAHOMA,
County of Osage, ss:

In the District Court of Osage County, Oklahoma.

No. 2372.

In the Matter of the ESTATE OF LAH-TAH-SAH, Osage Allottee #256, Deceased, on Appeal from the County Court to the District Court.

Journal Entry Overruling Motion to Dismiss the Appeal.

Now on this 8th day of March, 1915, the same being a regular judicial day of the March, 1915, term of said court the above entitled cause comes on for hearing before A. R. Museller, Special Judge, upon a motion of Laban Miles, appellee, to dismiss the appeal, appellant, John Kenney, appearing by John Embry, his attorney, and appellee, Laban Miles, appearing in his own proper person and by H. P. White, his attorney, and the court having heard the argument of counsel and being fully advised in the premises finds that the said motion to dismiss the appeal should be overruled, to which finding of the court said Laban Miles objects and excepts, which objections and exceptions are by the court allowed. It is therefore ordered, adjudged and decreed by the court that the motion of said Laban Miles, appellee, to dismiss the appeal be and the same hereby is by the court overruled, to which ruling of the court said Laban Miles objects and excepts, which objections and exceptions are by the court allowed.

By agreement of the parties and their respective counsel it is further ordered by the court that further hearing in the above entitled matter be adjourned to April 2nd, 1915.

A. R. MUSELLER,
Special Judge.

195 O. K.

H. P. WHITE,
Attorney for Laban Miles.
JOHN EMBRY,
Attorney for John Kenney.

Endorsed on back as follows: Filed March 8, 1915, Thos. Leahy, County Clerk, by Eula B. Foley, Deputy.
Rec. Journ. 7, page 408.

196 In the District Court of Osage County, Oklahoma.

Honorable A. R. Museller, Special Judge, Presiding.

Case No. 2372.

In the Matter of the ESTATE OF LAH-TAH-SAH, Deceased, Osage Allottee, No. 256, on Appeal from the County Court of Osage County.

Now on this April 2, 1915, the same being a judicial day of the regular March 1915, term of said court, Special Judge Honorable A. R. Museller, presiding, the above entitled matter came on for hearing upon the demurrer of the Appellant, John Kenney, to the plea of res adjudicata of the said Laban Miles, and after due argument by Counsel, and consideration thereof by the Court, the Court overrules the demurrer, to which ruling, the said John Kenney excepts.

Thereafter, and on the same day, the said matter came on for hearing in said court, the said Special Judge, presiding, upon the motion of the said Laban Miles, as appears in the record, to strike from the answer of the said John Kenney, certain of the designated paragraphs of such answer, and after argument by counsel and consideration thereof by the court, the Court sustains the motion of Laban Miles to strike paragraph 2, and also sustains as to Paragraph 3-a, paragraph 3-b, and paragraph 3-c, and the said John Kenney excepts to such ruling; and the said John Kenney specially excepts to the ruling, striking out the second section referred to as the second section; and the said John Kenney specially excepts to the ruling of the Court in striking out paragraph No. 2, of said answer; and John Kenney specially excepts to the ruling of the Court, striking out paragraph 3-a of said answer; and John Kenney specially excepts to the ruling of the Court in striking out paragraph 3-b of said answer; and John Kenney specially excepts to the ruling of the Court in striking out paragraph 3-c of said answer.

197 STATE OF OKLAHOMA,
County of Osage, ss:

In the District Court of Osage County, Oklahoma.

No. 2372.

In the Matter of the ESTATE OF LAH-TAH-SAH, Osage Allottee #256, Deceased, on Appeal from the County Court to the District Court.

Journal Entry of Judgment.

Now on this 2nd day of April, 1915, same being a regular judicial day of the March 1915 term of said court, the above entitled matter

came on regularly for hearing before A. R. Museller, Special Judge, pursuant to adjournment had on March 8th, 1915, the appellant John Kenney, appearing in his own proper person and by John Embry, his attorney, and appellee, Laban Miles, appearing in his own proper person and by H. P. White, his attorney, and said cause coming up for hearing first on the demurrer of appellant, John Kenney, to the plea of res adjudicata of the appellee, Laban Miles, and the court having heard the argument of counsel and being fully advised in the premises finds that said demurrer to said plea of res adjudicata should be overruled, to which finding of the court said John Kenney objects and excepts, which objections and exceptions are by the court allowed.

It is therefore, ordered, adjudged and decreed by the court that said demurrer to said plea of res adjudicata be and the same hereby is by the court overruled, to which ruling of the court said John Kenney objects and excepts, which objections and exceptions are by the court allowed.

Thereafter, to wit: on the 2nd day of April, 1915, the above entitled cause came on further for hearing before A. R. Museller, Special Judge, upon a motion of appellee, Laban Miles, to strike portions of the answer of said John Kenney to the plea of res adjudicata of the said Laban Miles, the parties further appearing as hereinabove stated and the court having heard the argument
198 of counsel and being fully advised in the premises finds that said motion should be sustained, to which ruling of the court said John Kenny objects and excepts, which said objections and exceptions are by the court allowed.

It is therefore, ordered, adjudged, and decreed by the court that said motion to strike all that part and parts of said answer of John Kenney to the plea of res adjudicata by said Laban Miles designated as "2", "3a", "3b", and "3c" be, and the same hereby is, by the court, sustained, to which ruling of the court the said John Kenny specially excepts to said ruling of the court as to that part of the answer designated as "2" and further specially excepts to the ruling of the court as to that part of the answer designated as 3a and specially excepts to the ruling of the court as to that part of the answer designated as "3b", and further specially excepts to the ruling of the court as to that part of the answer designated as "3c", which objections and exceptions are by the court allowed.

Thereafter, to wit: on the 2nd day of April, 1915, the above entitled matter came on regularly for hearing before A. R. Museller, Special Judge, pursuant to adjournment had on March 8th, 1915, upon the final account of John L. Bird, Administrator, the exceptions filed thereto by appellant, John Kenny, the plea of res adjudicata filed by the appellee, Laban Miles, and the answer of John Kenny to the said plea of res adjudicata by said Laban Miles. The appellant, John Kenny further appearing in his own proper person and by John Embry, his attorney and the appellee, Laban Miles, further appearing in his own proper person and by H. P. White, his attorney, and all parties waive trial by jury and announce ready for trial by the court. Thereupon the appellee, Laban Miles, offers

his testimony, and rests, and thereupon, appellant, John Kenny, offers his testimony, and rests, and the court having heard the evidence and the argument of counsel and being fully advised in the premises finds that the final account rendered by John L. Bird, administrator of the estate of said Lah-tah-sah, deceased, is true
199 and correct; that said administrator has made no profit out of the estate and has made disbursements as stated in said account and statement of disbursements since rendition of said final account and that said disbursements should be approved. The Court further finds that the administrator is entitled to the sum of $12.00 as commission on the amount of money belonging to said estate received and accounted for by said administrator.

The court further finds from the evidence that the heirs of the estate of said Lah-tah-sah, deceased, have heretofore been determined by the District Court of Osage County, Oklahoma, in the partition suit of Laban Miles, plaintiff, vs. John Kenny, defendant, No. 1896, as per judgment of court pleaded herein by said Laban Miles as a plea of res adjudicata. That said plea of res adjudicata should be sustained.

The court further finds from the evidence that the sole and only legal heirs of said Lah-tah-sah, deceased, are appelle-, Laban Miles, surviving husband, and appellant, John Kenny, the only living issue of said Lah-tah-sah, deceased; that upon the death of said Lah-tah-sah, deceased, her entire estate, consisting of lands, moneys and mineral interests, acquired by her through the division of the lands of the Osage Indians in Oklahoma, and the segregation of moneys belonging to said tribe by the United States, as a member of the Osage Tribe of Indians, descended in equal shares to said Laban Miles, surviving husband and said John Kenny, only living child, to-wit: an undivided one-half to each; that the judgment of the County Court of Osage County, Oklahoma, rendered on the 14th day of March, 1914, appealed from, should in all things be affirmed, to all of hich findings, said John Kenny objects and excepts, which objections and exceptions are by the court allowed.

It is, therefore, ordered, adjudged and decreed by the court that the plea of res adjudicata of appellee, Laban Miles, should be, and the same hereby is, by the court, sustained and that the final
200 account of said John L. Bird, administrator of said estate, be, and the same hereby is, by the court, approved and that said John L. Bird deduct from the money in his hands belonging to said estate the sum of $12.00 as compensation for services rendered by him in said estate and file a receipt therefor; that said administrator pay the accrued costs in the county court now unpaid less the cost of preparing transcript for appeal, out of the money in his hands belonging to said estate, and file receipt therefor; that appellant, John Kenny, pay the costs accruing on appeal, including the costs of transcript in the county court.

It is further ordered, adjudged and decreed by the court that the sole and only heirs of Lah-tah-sah, deceased, Osage Allottee, No. 256, are Laban Miles, surviving husband, and John Kenny, the only living issue of said Lah-tah-sah, deceased, at the time of her death;

that upon the death of said Lah-tah-sah, deceased, her entire estate descended in equal shares to said Laban Miles and to said John Kenny, to-wit: an undivided one-half thereof to each, and that upon the payment of costs and administration fees by said administrator as herein provided that said administrator pay the remainder now in his hands belonging to said estate- one-half to said Laban Miles and one-half to said John Kenny and take their receipt therefor, to all of which rulings, orders and judgment of the court said John Kenny objects and excepts, which objections and exceptions are by the court allowed.

A. R. MUSELLER,
Special Judge.

O. K.
H. P. WHITE,
Attorney for Laban Miles.
JOHN EMBRY,
Attorney for John Kenn-y.

Endorsed: Filed Apr. 2, 1915. Thos. Leahy, Court Clerk. By Eula B. Deputy.

Rec. Journ. 7 page 461.

201 In the District Court of Osage County, Oklahoma.

Honorable A. R. Museller, Special Judge, presiding.

In the Matter of the ESTATE OF LAH-TAH-SAH, Osage Allottee, No. 256, Deceased, on Appeal from the County Court of Osage County, Oklahoma.

Motion for New Trial.

Comes now John Kenn-y, heir at law of the said Lah-tah-sah, deceased, and moves the Court to vacate and set aside the findings, decree and judgment herein, and grant this Movant a new trial, for the following errors and causes which effect materially the sub excepted to by John Kenny.

1. Error of law committed by the Court in overruling the demurrer of John Kenny to the plea of res adjudicata herein, and excepted to by John Kenn-y.

2. Error of law committed by the Court in sustaining the motion of the said Laban Miles in striking out Paragraph 2 of this Movant Answer herein, and excepted to by John Kenny.

3. For error of law on the part of the Court in sustaining said motion in striking out Paragraph 3-*a* of said Answer, and excepted to by John Kenny.

4. For error of law by the Court in sustaining said motion in striking out Paragraph 3-*b* of said Answer, and excepted to by John Kenny.

5. And for error of law by the Court in sustaining said motion in striking out Paragraph 3-c of said answer, and excepted to by John Kenny.

6. For error of law committed by the Court at the trial, in excluding competent, material, and relevant testimony offered by
202 the said John Kenny in his behalf, and which rulings were excepted to by said John Kenny at the time.

7. For errors of law committed by the Court at the trial in admitting incompetent, irrelevant and immaterial testimony offered by the said Laban Miles, and objected to by this Movant, to which this Movant, John Kenny, excepted at the time.

8. For errors of law occurring at the trial and excepted to by this Movant, John Kenny, at the time.

9. For the reason that the finding, decision and decree of the court are not sustained by sufficient evidence, but are contrary to the evidence.

10. That the decree, decision and finding of the court is contrary to law.

11. For error of the court in sustaining the plea of res adjudicata set up and plead herein by the said Laban Miles, and for the refusal of the court to permit this Movant to introduce testimony touching the fact whether or not the said Laban Miles was ever married to the deceased, and excepted to by John Kenny at the time.

12. For errors of law occurring at the trial in that said John Kenny was not granted a trial de novo in this court, and was not granted a trial of the rights of heirs to the estate and property of said deceased, to which said John Kenny excepted at the time.

13. For errors of law committed at the trial by the court in refusing to admit the testimony offered for the purpose of showing that the said Laban Miles was not married to the said Lah-tah-sah, and was not an heir of the said Lah-tah-sah, which ruling was excepted to by the movant at the time.

14. The court erred at the trial in refusing to hear the testimony for the purpose of determining the legal heirs of the said
203 deceased, and in holding that the issues in that respect was concluded by the finding and judgment set up and contained in the said writing, marked "Laban Miles' Exhibit 4", a former judgment of the District Court of said county, to which John Kenny excepted at the time.

15. The court committed errors of law at the trial in admitting evidence in support of the plea of Laban Miles setting forth the prior adjudication and determination of the district court of said county, of the heirs of said deceased.

16. The court committed errors of law at the trial in permitting Laban Miles to introduce the said Exhibit 4, and the other exhibits relating thereto, for the reason that they have never been approved by the Secretary of the Interior, and pertain to the restricted lands of the deceased Osage Allottee.

For error of law in the assessment of the amount of recovery which was excessive in that the judgment attempts to make distribution of lands and moneys of deceased belonging to her as

an Osage Indian Allottee, which are restricted and not within the jurisdiction of said court.

JOHN EMBRY,
Attorney for John Kenny.

Endorsed: Filed Apr. 2, 1915. Thos. Leahy, Court Clerk. By Eula B. Foley, Deputy.

204 STATE OF OKLAHOMA,
County of Osage, ss:

In the District Court of Osage County, Oklahoma.

No. 2372.

In the Matter of the ESTATE OF LAH-TAH-SAH, Osage Allottee, #256, Deceased, on Appeal from the County Court to the District Court.

Now on this 2nd day of April, 1915, the same being a regular judicial day of the March, 1915, term of said court the above entitled matter came on for further hearing before A. R. Museller, Special Judge, upon a motion of appellant, John Kenny for a new trial said John Kenney appearing in his own proper person and by John Embry, his attorney and appellee, Laban Miles, appearing in his own proper person and by H. P. White, his attorney and the court having heard the argument of counsel and being fully advised in the premises finds that said motion for new trial should be overruled to which finding of the court the said John Kenny objects and excepts, which objections and exceptions are by the court allowed.

It is therefore ordered, adjudged and decreed by the court that said motion of the said John Kenny for a new trial be and the same hereby is by the court overruled to which ruling of the court the said John Kenny objects and excepts, which objections and exceptions are by the court allowed.

Thereupon said John Kenny asks 90 days in which to make and serve a case made; that said Laban Miles be allowed 10 days thereafter in which to suggest amendments to said case made and that said case made be signed and settled on 5 days written notice by either party and that said John Kenny be allowed 120 days to file petition in error in the Supreme Court.

205 It is, therefore, further ordered, by the court that for good cause shown said John Kenny have 90 days in which to make and serve a case made for appeal to the Supreme Court; that said Laban Miles have 10 days thereafter in which to suggest amendments to said case made, said case made to be settled and signed on 5 days written notice by either party, and that said John Kenny have 120 days to file petition in error in the Supreme Court.

And for good cause shown it is further ordered by the court

that said John Kenny have 20 days in which to file a supersedeas bond in the sum of $106.00.

A. R. MUSELLER,
Special Judge.

O. K.
H. P. WHITE,
Attorney for Laban Miles.
JOHN EMBRY,
Attorney for John Kenny.

Endorsed: Filed April 2, 1915, Thomas Leah, Court Clerk, by Eula B. Foley, Deputy.

Recorded Journal 7, page 460.

206 STATE OF OKLAHOMA,
Osage County, ss:

In the District Court of Osage County, Oklahoma

No. 2372.

In the Matter of the ESTATE OF LAH-TAH-SAH, Osage Allottee, #256, Deceased, on Appeal from the County Court to the District Court.

I, Thos. Leahy, Court Clerk and Clerk of the District Court for said county, do hereby certify that the foregoing is a full, true and correct transcript of the record in the above entitled cause.

In Testimony Whereof, I have hereunto set my hand and seal of this court, this the 25th day of September, 1915.

[SEAL.] THOS. LEAHY,
Court Clerk.

207 In the Supreme Court of the State of Oklahoma.

JOHN KENNY, Plaintiff in Error,

vs.

LABAN MILES and JOHN L. BIRD, Administrator of the Estate of Lah-tah-sah, Osage Allottee, #256, Deceased, Defendants in Error.

I, the undersigned, John L. Bird, Administrator of the estate of Lah-tah-sah, Osage Allottee #256, deceased, defendant in error in the above entitled cause, waive the issuance and service of summons in error in the above entitled cause in the Supreme Court of

the State of Oklahoma, and make this my general appearance in said cause and court.

JOHN L. BIRD,
Administrator of the Estate of Lah-tah-sah,
Osage Allottee #256, Deceased,
Defendant in Error.

Filed Sept. 28, 1915. William M. Franklin, Clerk.

208 And thereafter, to-wit, on the 14th day of December, 1915, in the Supreme Court of the State of Oklahoma, the following proceedings were had, in said cause:

Supreme Court, October Term, 1915, December 14th, 1915, Thirty-sixth Judicial Day.

7708.

JOHN KENNY, Plaintiff in Error,

vs.

LABAN MILES et al., Defendants in Error.

And now on this day it is ordered by the court that plaintiff in error be allowed 20 days in which to file response to the motion to dismiss filed herein.

209 And thereafter, to-wit: on the 27th day of December, 1915, in the Supreme Court of the State of Oklahoma, the following proceedings were had, in said cause:

In the Supreme Court of the State of Oklahoma.

7708.

JOHN KENNY, Plaintiff in Error,

vs.

LABAN MILES et al., Defendants in Error.

And now on this Dec. 27, 1915, it is ordered by the court that plaintiff in error be allowed until January 15, 1916, to file brief resisting motion to dismiss.

210 And thereafter, to-wit, on January 15, 1916, in the Supreme Court of the State of Oklahoma the following proceedings were had in said cause:

In the Supreme Court of the State of Oklahoma.

7708.

JOHN KENNY, Plaintiff in Error,

vs.

LABAN MILES et al., Defendants in Error.

And now on this, Jan. 15, 1916, it is ordered by the court that the time to file brief resisting motion to dismiss be extended for a period of 5 days.

211 And thereafter, to-wit, on January 18th, 1916, in the Supreme Court of the State of Oklahoma, the following proceedings were had in said cause:

Supreme Court, January Term, 1916, January 18th, 1916. Sixth Judicial Day.

7708.

JOHN KENNY, Plaintiff in Error,

vs.

LABAN MILES et al., Defendants in Error.

And now on this day it is ordered by the court that E. R. Hastings be permitted to file brief out of time in response to motion to dismiss.

212 And thereafter, to-wit, on February 29th, 1916, in the Supreme Court of the State of Oklahoma, the following proceedings were had in said cause:

Supreme Court, January Term, 1916, February 29th, 1916. Eighteenth Judicial Day.

7708.

JOHN KENNY, Plaintiff in Error,

vs.

LABAN MILES et al., Defendants in Error.

And now on this day it is ordered by the court that the motion to dismiss, filed Dec. 7, 1915, be, and the same is hereby overruled.

213 And thereafter, to-wit, on September 1st, 1916, in the Supreme Court of the State of Oklahoma, the following proceedings were had in said cause:

In the Supreme Court of the State of Oklahoma.

7708.

JOHN KENNY, Plaintiff in Error,

vs.

LABAN MILES et al., Defendants in Error.

And now on this, Sept. 1, 1916, it is ordered by the court that the above cause be set for oral argument on Oct. 2, 1916, and defendant in error herein is given permission to withdraw the case made to be corrected within 20 days from this date, under supervision of the trial court upon five days' notice to the adverse party.

214 And thereafter, to-wit, on October 2nd, 1916, in the Supreme Court of the State of Oklahoma, the following proceedings were had to-wit:

Supreme Court, July Term, 1916, October 2nd, 1916. Twenty-seventh Judicial Day.

7708.

JOHN KENNY, Plaintiff in Error,

vs.

LABAN MILES et al., Defendants in Error.

And now on this day the above cause is submitted on the record and briefs filed therein and oral argument had.

215 And thereafter, to-wit, on October 17th, 1916, in the Supreme Court of the State of Oklahoma, the following proceedings were had in said cause:

Supreme Court, October Term, 1916, October 17th, 1916. Seventh Judicial Day.

7708.

JOHN KENNY, Plaintiff in Error,

vs.

LABAN MILES et al., Defendants in Error.

And now on this day it is ordered by the court that permission be, and is hereby granted to correct the case made in the above cause as per stipulation filed in said cause.

216 And thereafter, to-wit, on January 2nd, 1917, in the Supreme Court of the State of Oklahoma, the following proceedings were had in said cause:

Supreme Court, October Term, 1916, January 2nd, 1917. Twenty-fifth Judicial Day.

7708.

JOHN KENNY, Plaintiff in Error,

vs.

LABAN MILES et al., Defendants in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed therein.

And the court having considered the same, finds that the judgment of the trial court in the above cause should be affirmed.

Opinion by Bleakmore, C.

By the Court: It is so ordered, the opinion herein is hereby adopted in whole, and judgment is entered accordingly.

217 In the Supreme Court of the State of Oklahoma, Supreme Court Commission, Division Number Three.

Jan. 2, 1917.—By the Court: Adopted in whole.

Filed Jan. 2, 1917. William M. Franklin, Clerk.

7708.

JOHN KENNY, Plaintiff in Error,

vs.

LABAN MILES and JOHN L. BIRD, Administrator of the Estate of Lah-tah-sah, Osage Allottee, No. 256, Deceased, Defendants in Error.

Syllabus.

1. The Act of Congress of June 28, 1906, c. 3572 34 Stat. L. 539, placed no restrictions upon the alienation by heirs of inherited lands allotted and deeded in the right of a member of the Osage Tribe of Indians after his death, save only the mineral interests therein, reserved to the Tribe, individual disposition of which is expressly inhibited.

2. The purpose of the Act of Congress of April 15, 1912, 37 Stat. L. 86, c. 83, was not to impose restrictions upon alienation of Osage lands, but to authorize the conveyance of such of said lands to which restrictions had attached by reason of their allotment to living members of the tribe, who had subsequently died, leaving surviving them Indian heirs, members of the tribe, to whom certificates of competency were issued.

Error from the District Court of Osage County, A. R. Muselle, Special Judge.

218 Action by John Kenny, Plaintiff, against Laban Miles, et al, Defendants. Judgment for defendant and plaintiff brings error.

Affirmed.

Edward R. Hastings, Paul Van Winkle, John Embry, Attorneys for Plaintiff in Error.

H. P. White, Attorney for Defendant in Error.

BLEAKMORE, *C:*

Plaintiff in error seeks reversal of a judgment of the district court of Osage County, rendered April 2, 1915, upon appeal from the county court of that county, ordering a distribution of the estate of a deceased member of the Osage Tribe of Indians, consisting of lands selected and patented in her name subsequent to her death, and certain proceeds arising from the rental thereof.

The decedent Lah-tah-sah, a member of the Osage Tribe, entitled

to a distributive share of the tribal property by virtue of an Act of Congress approved June 28, 1906, (Stat. L. 935), died intestate in 1908, before receiving the same. After her death the lands involved were selected in her right and deeds therefor, approved by the Secretary of the Interior, were executed in her name as grantee, and recorded. These lands descended to her heirs according to the laws of the State of Oklahoma.

On February 28, 1912, Laban Miles, defendant in error, began an action in the district court of Osage County to effect a partition of said lands, alleging that he was the surviving husband, and John Kenny, the plaintiff in error, the only child of Lah-tah-sah, and that upon her death each succeeded to an undivided one-half of the lands thereafter allotted and patented in her name. To this
219 petition John Kenny filed his answer and cross-petition, averring that he was the only heir of the decedent, the sole owner, in constructive possession of the premises, and entitled to the exclusive possession thereof; that the claim of Laban Miles constituted a cloud upon his title, etc., and prayed for relief accordingly. The sole controverted issue of fact in this action was the marriage of Laban Miles to Lah-tah-sah. The court after hearing evidence, made elaborate findings of fact, determined such issues in favor of Miles, ordered partition of the lands, and appointed commissioners for such purpose. Later the administrator of the estate of Lah-tah-sah filed his final report in the county court of Osage County, praying a distribution of the portion thereof in his possession, consisting of the lands allotted in her name, and the income therefrom. John Kenny appeared in such proceeding and asserted that he was the sole heir of Lah-tah-sah, and entitled to the entire estate. Laban Miles responded, setting forth that such claim had been tried and finally determined by the district court of Osage County in the partition action, and pleaded the judgment therein as conclusive of the rights of Kenny and himself to share equally in the distribution of said lands and proceeds. To this plea *the* of res judicata, Kenny demurred. The demurrer was overruled, and upon hearing the property was ordered distributed equally between him and Miles. Appeal was had to the District court, with like result.

Both Kenny and Miles are members of the Osage Tribe and neither has received a certificate of competency.

The provisions of the Act of July 28, 1906, supra, are fully set forth in the opinion of the Supreme Court of the United States in Levindale Lead & Zinc Mining Co. v. Coleman (Co. App. Ad Sheet, July 15, 1916, p. 644), as follows:
220 "That act provided that the roll of the Osage Tribe as it existed on January 1, 1906, with the additions specified, should be the roll of the tribe and constitute its 'legal membership.' Children born between January 1, 1906, and July 1, 1907, to persons whose names were on the roll on the first-mentioned date, 'including the children of members of the tribe who have, or have had, white husbands,' were to be recognized as members for the purpose of the division. (Sec. 1). All lands were to be divided 'among the members of said tribe, giving to each his or her fair share thereof

in acres' as specifically set forth; that is 'each member' as shown by the roll was to be allowed to make three selections of 160 acres each in the manner described. (Sec. 2.) Restrictions were imposed as follows:

" 'Each member of said tribe shall be permitted to designate which of his three selections shall be a homestead, and his certificate of allotment and deed shall designate the same as a homestead, and the same shall be inalienable and nontaxable, until otherwise provided by Act of Congress. The other two selections of each member, together with his share of the remaining lands allotted to the member, shall be known as surplus land, and shall be inalienable for twenty-five years, except as hereinafter provided.' (Sec. 2, Fourth).

"After 'each member' has made the three selections the remaining lands of the tribe, except as stated, were to be divided 'as equally as practicable among said members by a commission to be
221 appointed.' (Sec. 2, fifth). The Secretary of the Interior in his discretion, at the request of any 'adult member of the tribe,' was to issue 'to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded him by reason of -his act, except his homestead, which shall remain inalienable and nontaxable, for a period of twenty-five years, or during the life of the homestead allottee,' if, upon investigation, 'he shall find any such member fully competent' to care for his affairs. It was provided that upon the issuance of such a certificate of competency the lands of such 'member' except homestead lands, should 'become subject to taxation,' and that 'such member,' except as provided, should have the right to 'manage, control and dispose of his or her lands the same as any citizen of the United States.' It was further provided that the surplus lands should be 'nontaxable' for the period of three years from the approval of the act 'except where certificates of competency are issued or in case of the death of the allottee, unless otherwise provided by Congress.' (Sec. 2, Seventh). Oil, gas, coal or other minerals 'covered by the lands' were 'reserved to the Osage Tribe for a period of twenty-five years.' (id. #3). All funds belonging to the tribe, and moneys accruing to it, were to be 'held in trust by the United States for the period of twenty-five years' from January 1, 1907, except as provided. The funds of the tribe, and moneys accruing from the sale of Kansas lands, together with those due upon claims against the United States, were to be segregated and placed to the credit of the 'individual members' of the tribe 'on a basis of a pro rata division,' or 'to their heirs as hereinafter provided,' and such credit was to draw interest, to be
222 'paid quarterly' to the members entitled thereto;' and the disposition of royalties from mineral leases was specially prescribed. (Sec. 4.) At the expiration of twenty-five years from January 1, 1907, the lands, mineral interests, and moneys held in trust by the United States were to be the absolute property of the 'individual members' of the tribe, according to the roll, 'or their heirs, as herein provided,' and the deeds were to be issued accordingly. (Sec. 5). Sections 6 and 7 are as follows:

" 'Sec. 6. That the lands, moneys, and mineral interests, herein

provided for, of any deceased member of the Osage Tribe shall descend to his or her legal heirs, according to the laws of the territory of Oklahoma, or of the state in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys and mineral interests, must go to the mother and father equally.

" 'Sec. 7. That the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided; and said members, or their heirs, shall have the right to use and to lease said lands for farming, grazing, or any other purpose not otherwise specifically provided for herein, and said member shall have full control of the same, including the proceeds thereof; Provided, That parents of minor members of the tribe shall have the control and use
223 of said minors' lands, together with the proceeds of the same, until said minors arrive at their majority: And provided further, That all leases given on said lands for the benefit of the individual members of the tribe entitled thereto, or for their heirs, shall be subject only to the approval of the Secretary of the Interior.'

"Deeds to the Osage lands were to be executed by the principal chief, but were not to be valid until approved by the Secretary of the Interior (#8), and it was further provided that whatever was necessary to carry into effect the provisions of the act should be done under the authority of this officer (#12). Regulations have been adopted by the Secretary of the Interior governing the leasing (under # # 7, 12) of lands 'allotted to Osage Indians.' These provide, among other things, that 'lands of deceased allottees may be leased by the heirs jointly', as stated. (Regulations 11, 12, approved October 25, 1910; 8, approved June 17, 1913). By joint congressional resolution approved February 27, 1909, (35 Stat. at L. 1167) it is provided: "That homesteads of members of the Osage Tribe of Indians in Oklahoma may consist of land designated from any one or more of their first three allotment selections taken under the Act of Congress approved June twenty-eighth, nineteen hundred and six, entitled, 'An Act for the division of the lands and funds of the Osage Indians in Oklahoma Territory, and for other pur-
224 poses,' the designation thereof to be subject to approval by the Secretary of the Interior."

By Sec. 6 of an Act of Congress of April 15, 1912, (Stat. at L. —), it is provided:

"That from and after the approval of this act the lands of deceased Osage Allottees, unless the heirs agree to partition the same, may be partitioned or sold upon proper order of any court of competent jurisdiction in accordance with the laws of the State of Oklahoma: Provided, That no partition or sale of the restricted lands of a deceased Osage allottee shall be valid until approved by the Secretary of the Interior. Where some of the heirs are minors, the said Court shall appoint a guardian ad litem for said minors in the matter of said partition, and partition of said land shall be valid when approved by the court and the Secretary of the Interior. When the heirs of such deceased allottees have certificates of competency, or

are not members of the tribe, the restrictions on alienation are hereby removed. If some of the heirs are competent and others have not certificates of competency, the proceeds of such part of the sale as the competent heirs shall be entitled to shall be paid to them without the intervention of an administrator. The shares due minor heirs, including such minor Indian heirs as may not be tribal members and those Indian heirs not having certificates of competency, shall be paid into the Treasury of the United States and placed to the credit of the Indians upon the same conditions as attach to segregated shares of the Osage national fund, or with the approval of the Secretary of the Interior paid to the duly appointed guardian. The same disposition as herein provided for with reference to the proceeds of inherited lands sold shall be made of the money in the Treasury of the United States to the credit of deceased Osage allottees."

It is contended by plaintiff in error that the lands involved constitute the homestead and surplus allotments of a deceased member of the Osage Tribe, and by virtue of the foregoing congressional enactments are alienable only upon issuance of certificates of competency to the heirs.

Defendant in error insists that no restrictions upon alienation of the lands in question by the heirs of decedent ever existed, for the reason that such lands were not selected, nor a homestead therein designated, by the deceased member of the tribe in her lifetime, but that such selection was made in her right and deeds therefor executed in her name after her death, and therefore such lands are neither homestead nor surplus, but constitute a separate and distinct class of allotment upon the alienation of which no restrictions were imposed by Congress.

As sustaining his contention, plaintiff in error relies upon United States vs. Aaron, 183" Fed. 347, affirmed by the Circuit Court of Appeals, 8" Circuit, in Aaron vs. United States, 204 Federal, 943, wherein it was held:

1. Lands of full-blood Osage Indian allottees selected by and alloted to them before their decease were inalienable by their full-blood heirs in March, 1909, under the Act of June 28, 1906, c. 3572, 34 Stat. 539, 541, 542, where none of them had obtained certificates of competency.

"2. The homestead lands of such allottees were likewise inalienable by such heirs.

"The fourth paragraph of section 2, of the Act of June 28, 1906, c. 3572, 34 Stat. 541, provided that the homestead lands of Osage Indian allottees 'shall be inalienable and nontaxable until otherwise provided by Act of Congress.' The seventh paragraph of the same section declared that the Secretary might issue to any member of the Osage Tribe a certificate of competency, authorizing him to deed his lands, 'except his homestead, which shall remain inalienable and non taxable for a period of twenty-five years, or during the life of the allottee."

The opinions in the case relied upon are not decisive of the question here presented, for the reason that the same was not involved

or determined therein as shown by the language employed in the latter opinion, namely:

"But counsel for the appellants contend that no restriction upon alienation was ever imposed upon the lands here in question, because they were not selected by Cena June, nor did she designate her homestead therein and thus divide them into homestead lands and surplus lands, nor were they allotted to her before her decease, but they were selected and allotted to her heir after her decease, so that they constitute a different class of lands from either the homstead lands or the surplus lands, and are thus exempt from all restrictions upon their alienation under the decisions in Mullen v. United States, 224 U. S. 448, 452, 457, 32 Sup. Ct. 494, 56 L. Ed. 834, and Hancock v. Mutual Trust Company, 24 Okl. 391, 103 Pac. 566. A
227 careful examination of the record, however, has satisfied us that the defendants are conclusively estopped from making this claim. The complainant alleged in its bill that a described part of the lands here in controversy was allotted to Cena June 'as the homestead of said Cena June, duly selected as and for such homestead,' and that a described portion of them was allotted to the said Cena June 'as her surplus lands.' The agreed statement of facts, upon which the case was heard and the decree was founded, contained a stipulation that under the Act of June 28, 1906, 'Cena June, who was a duly enrolled member of the Osage tribe of Indians in Oklahoma, received as her homestead allotment the lands described and set forth as her homestead allotment in paragraph two of the amended bill,' and '* * * that said Cena June was duly allotted as a member of said tribe as the lands set forth as her surplus selection in the amended bill herein.' Consequently, it is too late now for the appellants to claim that the selections, the designation of the homestead, and the allotments were not made until after the death of Cena June. * * *"

In Levindale Lead & Zinc Mining Co. v. Coleman, supra, it is said:

"Taken in their natural sense, the provisions of the fourth paragraph of #2 apply only to allotments made to members of the tribe. There is nothing to suggest that a nonmember should designate a 'homestead', and unless lands were thus segregated the restrictions as to 'homesteads' would not apply. With respect to 'surplus lands', it will be observed that it is only selections
228 of each 'member', and the share of remaining lands 'allotted to the member', which constitute lands so described and thus come under the stated restrictions. It was early ruled administratively that under #6 the right to the member's share, though unallotted in his lifetime, passed to his legal heirs as there defined, and this we assume to be the meaning of the statute. But the fact that the nonmember takes in the right of the deceased member is not enough to subject him to restrictions which are plainly imposed for the protection of members. It is urged that the restrictions, by virtue of their terms, were to run with the land until they expired by limitation or were removed (Bowling v. United States, 233 U. S. 528, 58 L. Ed. 1080, 34 Sup. Ct. Rep. 659), but restrictions

would not run with the land unless they had attached. And, even where they had attached, they would run only according to the intendment of the statute. We find no indication of an intent that they should apply to lands, or an interest in ownership of white men who were nonmembers of the tribe. Emphasis is placed by the defendant in error on the provisions of #7 as to leases; but it would be an inadmissible construction of this section to say that the word 'heirs' was there used in contradistinction to 'members'. This provision as to leases, in the light of the purpose of the Act, had reference, we think, to the 'individual members' who received allotments and the Indian heirs of such members.

229 "The view we have taken of the inapplicability of the restrictions upon alienation in a case like the present finds support in the fact that there was no provision for giving to nonmembers certificates of competency. Under the seventh paragraph of #2, any 'adult member' of the tribe, although a full-blood Indian, who could satisfy the Secretary of the Interior of his ability to transact his own business, might obtain a certificate and thus be enabled to dispose of his 'surplus land'; but a competent white man, not a member, could not be relieved. It would seem to be evident that such an incongruous result was not intended, the language plainly showing that Indians alone were deemed to be subjected to the restrictions.

"It would seem that the only restrictions placed upon alienation of the allotted lands of the Osage Tribe are found in the fourth paragraph of section two of the Act of June 28, 1906, supra, and 'apply only to allotments made to members of the tribe.' "

The general scheme for division of the Osage lands was similar to that adopted for the distribution of those of the Five Civilized Tribes, contemplating primarily, their allotment to living members of the tribe, separating the homestead and surplus and providing certain restrictions upon alienation and exemption from taxation obviously for the better protection of the allottee in the quiet enjoyment thereof; but anticipating that such character of allotments would become impossible in the event of the death of members entitled thereto, Congress provided in such contingency for allotments going immediately to heirs, in the right of such deceased members, of the shares of the tribal property to which they would have been entitled to receive had they survived. As to the latter class of allotments no

230 provision was made for the segregation of the homestead and surplus, and no occasion for such separation existed, as each of said heirs, if a member of the tribe, was provided with a homestead fully protected in his own right.

In neither the Osage Division Act nor the Allotment Act relating to the Five Civilized Tribes (save perhaps in one instance), was there a distinction made between heirs; they might or might not be members of the tribe, but each would take his undivided share under the particular Act in the same manner and with the same powers of disposition, unless otherwise expressly provided.

In Mullen v. United States, 224 U. S. 448, 32 Sup. Ct. 494, 56 L.

Ed. 834, involving the Choctaw and Chickasaw Allotment Acts, it is said:

"It is true that under the Creek agreement, in cases where the ancestor died before allotment, the lands were to be allotted directly to the heirs, while under the Choctaw and Chickasaw agreement the allotment was to be made in the name of the deceased member, and 'descend to his heirs.' This, however, is merely formal distinction and implies no difference in substance. In both cases the lands were to go immediately to the heirs, and the mere circumstance that, under the language of the statute, the allotment was to be made in the name of the deceased ancestor instead of the names of the heirs furnished no reason for implying a requirement that there should be a designation of a portion of the lands as homestead.

231 We have, then, a case where all the allotted lands going to the heirs are of the same character, and there is no restriction upon the right of alienation expressed in the statute. Had the lands been allotted in the lifetime of the ancestor, one-half of them, constituting homestead, would have been free from restrictions upon his death. The only difficulty springs from the language of paragraph 16, limiting the right of heirs to sell 'surplus' lands. But, on examining the context, it appears that this provision is part of the scheme for *allotments to living members, where there is a segregation of homestead and surplus lands respectively.* Whatever the policy of such a distinction which gives a greater freedom for the disposition by heirs of homestead lands than of the additional lands, there is no warrant for importing it into paragraph 22, where there is no such segregation. It would be manifestly inappropriate to imply the restriction in such cases so as to make is applicable to all the lands taken by the heirs, and there is no occasion or authority for creating a division of the lands so as to impose a restriction upon a part of them. (Italics ours.)

"There being no restriction upon the right of alienation, the heirs in the case involved in this appeal were entitled to make the conveyances. The bill alleged that the tracts embraced in these conveyances were 'allotted lands,' and certificates of allotment had been issued. These Indian heirs were vested with an interest in the property which, in the absence of any provision to the contrary, was subject of sale. The fact that they were 'full-blood

232 Indians makes no difference in this case, for, at the time of the conveyance in question, heirs of the full-blood, taking under the provisions of paragraph 22 of the supplemental agreement, had the same right of alienation as other heirs."

In the Mullen case, supra, the Supreme Court of the United States further says:

"While the lands were to be allotted in the name of the deceased they passed at once to his heirs, and as each heir, if a member of the tribe, was already supplied with his homestead of 160 acres, there was no occasion for a further selection for that purpose from the inherited lands. No distinction is made between the heirs; they might or might not be members of the tribe and where there were a number of heirs, each would take his undivided share. It is quite

evident that there is no basis for implying the requirement that in such case there should be a selection of portion of the allotment as a homestead, and all the lands allotted under paragraph 22 are plainly upon the same footing. While it appear- from the record that, in the present case, separate certificates of allotment were issued for homestead and surplus lands, this was without the sanction of the statute."

In Skelton vs. Dill, 235, U. S. 206, 59 L. Ed. 198, construing the Allotment Acts of the Creek Tribe it is said:

"Evidently anticipating that participation in the allotment and distribution might in some instances be cut off by death, Congress made provisions for such a contingency. * * *

"Whether these restrictions were intended to apply only
233 to allotments made to living citizens in their own right, or to apply as well to allotments made on behalf of deceased members, is the question for decision. The Supreme Court of the State, when passing upon this case, held them applicable to both classes of allotments, but in the later case of Rentie v. McCoy, 35 Okla. 77, 128 Pac. 244, reached the other conclusion, as did also the district court for the eastern district of Oklahoma in Reed v. Welty, 197 Fed. 419. We think the better reasoning lies with the view that the restrictions apply only to allotments made to living citizens in their own right. Not only do the provisions of #16 of the supplemental act lend themselves to that view, but in those sections of both acts which deal with allotments on behalf of deceased persons there is no suggestion of a restriction upon alienation. This difference in legislative treatment doubtless was deliberate, and reflects a corresponding difference in purpose. In Mullen v. United States, 224 U. S. 448, 56 L. Ed. 834, 32 Sup. Ct. Rep. 494, a like question arose under the original and supplemental acts relating to the Choctaw and Chickasaw lands, and we held that the restrictions upon alienation imposed by those acts were applicable to allotments to living members in their own right, but not to allotments on behalf of members then deceased. We do not perceive anything in the acts relating to the Creek Lands which calls for a different conclusion. * * *"

We hold that the Act of June 28, 1906, placed no restrictions upon alienation by heirs of inherited lands allotted and deeded in the right of a member of the Osage tribe after his death, save only the interest in the minerals, reserved to the tribe, the individual disposition of which is expressly inhibited.

234 The evident purpose of the Act of April 15, 1912, supra, was not to impose restrictions upon alienation of Osage Lands, but to authorize the conveyance of such of said lands to which restrictions had attached by reason of their allotment to living members of the tribe who had subsequently died, leaving surviving them Indian heirs, members of the tribe, to whom certificates of competency were issued.

In Levindale Lead & Zinc Mining Co. vs. Coleman, it was said: "* * * But it is the Act of 1912 upon which chief reliance is placed. This was 'Supplementary to and amendatory of' the Act

of 1906, and provides, among other things, in #6, relating to the lands 'of deceased Osage allottees,' that 'when the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed. We lay aside the suggestion that 'deceased Osage allottees' may be taken to mean only members who received allotments in their own right while living, expressing no opinion upon that point. For not only is a legislative declaration of the intent of a previous act not absolutely controlling, but we think that in the present instance the purpose of Congress is manifest. This suit had been decided in the district court of the State in December, 1910, and it had been there held that the restriction applied to nonmembers. The case had been appealed, but it may well be supposed that Congress intended to remove the restriction upon a nonmember, if such a restriction could be deemed to exist. That, we are satisfied,
235 was the object of the provision, and it was not an attempt to import into the earlier Act a restriction which lay wholly outside its express terms and the policy of guardianship it was intended to execute.

We conclude that the district court of Osage County had jurisdiction to partition the lands involved, and that its judgment was conclusive of the rights of the parties in this proceeding to share equally in the disposition of the lands in question.

In view of this conclusion it is unnecessary to determine the very interesting question presented by the briefs relative to the capacity in which the district court of Osage County would have acted and the conclusiveness of this judgment in the event it had been held that the lands in question were restricted lands such as contemplated by the Act of April 15, 1912, supra.

It follows that the judgment of the court below should be affirmed.

236 Filed in Supreme Court of Oklahoma Jan. 16, 1917. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 7708.

JOHN KENNY, Plaintiff in Error.

v.

LABAN MILES et al., Defendants in Error.

Petition for Re-hearing by Plaintiff in Error.

Comes now the plaintiff in error, and for re-hearing in the above-entitled cause and a re-hearing on and reversal of the decision of the Honorable Supreme Court Commission, and approval thereof by this Honorable Court, affirming the judgment rendered in the court below, alleges and relies upon the grounds following:

This was a contest relative to the estate of a full-blood Osage allottee woman named "Lah-tah-sah," Osage Allottee No. 256, who died in Osage County, where she had been allotted lands, without receiving a certificate of competency or having her restrictions removed. Plaintiff in error, her only son, who was also a non-competent Osage Indian, survived her, and is her only heir-at-law, unless the defendant, Laban Miles, who is also a non-competent Osage, was the husband of the deceased, which is disputed; and this is an appeal from the District Court of Osage County, distributing lands and adjudging Laban Miles an heir, in an appeal from the County Court involving its probate jurisdiction.

Before the order of distribution complained of, Laban Miles brought, in the District Court of Osage County, Oklahoma,
237 an action against John Kenny (the plaintiff in error), and therein, on April 25, 1913, recovered judgment against Kenny for a partition of the lands allotted to Lah-tah-sah, on the theory that he was the husband and heir of Lah-tah-sah and entitled to one-half of her estate.

The petition filed by Laban Miles for this judgment in partition in the District Court of Osage County alleged (Plaintiff in error's brief, page 17—Record page 68):

"1. That said plaintiff and the said defendant are the sole heirs of Lah-tah-sah, Osage Allottee No. 256, deceased. That by a deed dated September 28, 1908, recorded Mar. 2, 1909, in Book 1 of Homestead Deeds, page 247, in the office of the Register of Deeds for Osage County, Oklahoma, there was conveyed to Lah-tah-sah the following tract of land in Osage County, Oklahoma, to-wit:

N. W. ¼ of Section 26, Township 24 North, Range 4 East of the Indian Meridian, containing 160 acres.

"That by a deed dated May 15, 1909, recorded August 10, 1909, in Book 1 of Allotment Deeds, page 282, in the office of the Register of Deeds for Osage County, Oklahoma, there was conveyed to Lah-tah-sah the following tracts of land in Osage County, Oklahoma, to-wit:

"N. E. ¼ of Section 30, Township 28, Range 9; S. E. ¼ of Section 30, Township 28, Range 9; Lot 3, E. ½ of S. W. ¼ of N. W. ¼, S. E. ¼ of N. W. ¼, N. ½ of S. E. ¼ of Section 4, Township 20, Range 10, all North and East of the Indian Base and Meridian, containing 500.12 acres, more or less."

Upon the trial of such partition action, and in the judgment rendered therein, the court found as a conclusion of law, that Lah-tah-sah, Osage Allottee No. 256, died intestate, on or about the 19th day of August, 1908, leaving an estate, consisting in part of the lands described in plaintiff's petition—that is, in the petition of Laban Miles for partition (Plaintiff in error's brief, page 22—Record page 76). This judgment will be referred to as a "partition judgment."

The proceeding in the instant case is not the "partition proceeding," but is a different proceeding, originating in the probate jurisdiction of the County Court of Osage County, instituted by the de-

fendant in error, Laban Miles, who, in July, 1912, petitioned
238 for the appointment of John Bird as administrator of such estate, and in such petition, referring to the estate of Lah-tah-sah, deceased, recited:

"The general character and probable value of the estate left by decedent, is as follows:

"Lands allotted to her as a member of the Osage Tribe of Indians, in Osage County, Oklahoma, amounting to about 660 acres, of the approximate yearly rental value of $500.00, and Tribal Trust Funds belonging to her as a member of such Tribe, and to her credit in the Treasury of the United States, together with oil, gas and other mineral annuities, of the approximate yearly income of $600.00" (Record page 3).

That in pursuance of this petition, letters of administration were issued to John Bird upon such estate, and the appraisers returned as real estate belonging to Lah-tah-sah, the same lands in controversy here (Record page 9).

In the course of this administration, when John Kenny (plaintiff in error) objected to the claim of Laban Miles to be an heir of Lah-tah-sah, deceased, to these lands, Laban Miles files his Plea of Res Adjudicata, setting up therein and offering in support thereof, the petition and judgment in partition hereinbefore referred to, rendered in the District Court of Osage County, in 1913; and we allege and submit that in such administration proceeding upon the estate of the said Lah-tah-sah, deceased, and with respect to such lands as a part of her estate, and upon the recital in the petition for letters of administration by the defendant in error that these lands had been allotted to Lah-tah-sah as a member of the Osage Tribe of Indians, and the findings of fact in the partition judgment, which was a part of the Plea of Res Adjudicata, that Osage Allottee No. 256 died intestate on or about the 19th day of August, 1908, leaving an estate consisting in part of the lands described in plaintiff's petition, and the fact that she was given an allotment number, all show that the said Lah-tah-sah was allotted before her death, and
239 that the defendant in error is estopped by this proceeding by him instituted, to deny that she was allotted before her death, and that the judgment pleaded as res adjudicata shows that these lands were the estate of the said Lah-tah-sah at the time of her death; that the said question is decisive of said case, and, duly submitted by counsel, has been overlooked by the court, and that on account of the fact that Lah-tah-sah was allotted said lands in her lifetime, the Honorable Commission was in error in finding, and this Honorable Court in approving, "that after her death, the lands involved were selected in her right and deeds therefor, approved by the Secretary of the Interior, were executed in her name as grantee and recorded," and in affirming the judgment appealed from.

The lands were allotted to Lah-tah-sah and she was given an allotment number prior to her death, and if the County Court of Osage County, or any other court in this proceeding, has jurisdiction to render any judgment with respect to these lands, it must be upon

the theory that they are of the estate of Lah-tah-sah, deceased, and the lands of her as a deceased Osage allottee.

That the Honorable Commission and Court decided this case upon an erroneous conclusion and finding of law, and the Honorable Commission and Court overlooked the fact aforesaid, which is decisive of this case, and erred in finding that these lands were not selected or allotted until after the death of Lah-tah-sah, and in finding that they were not the lands of the deceased Osage allottee, and in affirming said judgment.

Plaintiff in error alleges that the case of Aaron v. United States, 204 Fed. 943, 123 C. C. A. 265, is an authority decisive of this case, and in which it was held by the United States Circuit Court of Appeals that lands allotted to one Cena June, an Osage woman, before her death, but not conveyed to her or the heirs by deed until after her death, were restricted lands; that the purchaser in that
240 case, by his pleading and stipulation that such lands were allotted to Cena June, was estopped to deny that fact; that it was too late for the appellant to claim that the selection, the designation of the homestead, and the allotment, were not made until after the death of Cena June; that the court below did not hear or decide the case upon that theory; that *that* the appellate court could not; that "the fact that the deeds of these allotments were subsequently made to the heirs of Cena June, after her decease, is immaterial; when the allotments have been made the equitable title, the right to legal title, and the entire beneficial interest in the land, subject to the restriction upon alienation imposed upon them by the Act of Congress at the time they were allotted, vested in the allottee, and the title to these allotments, under the subsequent deeds, to her heirs, related back to and took effect at the time of the allotments. There is therefore no escape from the conclusion that the title of the heirs to the homestead land and the surplus lands of this allottee were subject to the respective restrictions imposed upon those classes of land by the Act of June 28, 1906."

That in this proceeding, in the instant case, originating in the probate jurisdiction of the County Court of Osage County, Oklahoma, these lands, at the instance of defendant in error, were brought upon the record, under the jurisdiction of such court, as the allotment of the decedent; that it was essential to the jurisdiction of such County Court, and of the District Court on appeal, that the title to these lands, either equitable or legal, has vested in the decedent; that if they were not the allotment of the decedent, the County Court, and the District Court on appeal, were without jurisdiction to render the judgment distributing any interest therein to the defendant in error, and defendant in error, while claiming the benefit of that jurisdiction, is estopped to deny the fact upon which such jurisdiction depends—that they are the lands of this deceased Osage allottee; and if they are not such lands, within the meaning
241 of the Act of Congress of April 15, 1912, requiring the approval of the Secretary of the Interior to their partition, as contended by plaintiff in error, then the County Court of Osage County, in the instant case, and the District Court of that County on

appeal, were without jurisdiction, and the judgment should not be affirmed.

And if they are the lands of such deceased Osage allottee, such allottee having died without receiving a certificate of competency, and the said John Kenny and Laban Miles both being full-blood Osage Indians without certificates of competency, then the plea of res adjudicata, the judgment upon which it rests not being approved by the Honorable Secretary of the Interior, is without effect, and the lands involved being restricted, the judgment of the lower court should be reversed; that to allow that these are the lands of Lah-tah-sah, deceased, to give the probate jurisdiction of the subject-matter, and to deny that fact to avoid the restrictions and limitations of the Act of April 15, 1912, is a contradiction which this Court should not permit to stand.

That the Honorable Commission and Court overlooked the following controlling decisions and express statutes, which were duly called to the attention of the Court, and which decisions and express statutes are decisive of this case:

Section One (1), of the Act of June 28, 1906 (34 Stat. L. 539) is as follows:

"That the roll of the Osage tribe of Indians, as shown by the records of the United States in the office of the United States Indian agent at the Osage Agency, Oklahoma Territory, as it existed on the first day of January, nineteen hundred and six, and all children born between January first, nineteen hundred and six, and July first, nineteen hundred and seven, to persons whose names are on said roll on January first, nineteen hundred and six, and all children whose names are not now on said roll, but who were born to members of the tribe whose names were on the said roll on January first, nineteen hundred and six, including the children of members of the tribe who have, or have had, white husbands, is hereby declared to be the roll of said tribe and to constitute the legal membership thereof; Provided, That the principal chief of the Osages shall, within three months from and after the approval of this Act, file with the Secretary of the Interior a list of the names which the tribe claims were placed upon the roll by fraud, but no name shall be included in said list of any person or his descendants that was placed on said
242 roll prior to the thirty-first day of December, eighteen hundred and eighty-one, the date of the adoption of the Osage constitution, and the Secretary of the Interior, as early as practicable, shall carefully investigate such cases and shall determine which of said persons, if any, are entitled to enrollment; but the tribe must affirmatively show what names have been placed upon said roll by fraud; but where the rights of persons to enrollment to the Osage roll have been investigated by the Interior Department and it has been determined by the Secretary of the Interior that such persons were entitled to enrollment, their names shall not be stricken from the roll for fraud except upon newly discovered evidence; and the Secretary of the Interior shall have authority to place on the Osage roll the names of all persons found by him, after investigation, to be so entitled, whose applications were pending on the date of the approval of this Act; and the Secretary of the Interior is hereby author-

ized to strike from the said roll the names of persons or their descendants which he finds were placed thereon by or through fraud, and the said roll as above provided, after the revision and approval of the Secretary of the Interior, as herein provided, shall constitute the approved roll of said tribe; and the action of the Secretary of the Interior in the revision of the roll as herein provided shall be final, and the provisions of the Act of Congress of August fifteenth, eighteen hundred and ninety-four, Twenty-eighth Statutes at Large, page three hundred and five, granting persons of Indian blood who have been denied allotments the right to appeal to the courts, are hereby repealed as far as the same relate to the Osage Indians; and the tribal lands and tribal funds of said tribe shall be equally divided among the members of said tribe as hereinafter provided."

That the above express provisions and the other provisions of said Act provide for the settlement of a roll of the members of said Tribe as of January 1, 1906, and that all persons, including the decedent in this case, whose names were on that roll, were, under this law, members of the Tribe and entitled to allotments, and that their share of the tribal properties became fixed as of January 1, 1906, and thenceforward such member held such interest in her individual capacity and not as a member of the community, subject only to proper identification of the grant; and the death of such member did not destroy her interest, but it descended to her heirs; and that all heirs, members of such Tribe, took such lands subject to the restrictions; that the characterization of such lands as "surplus" and "homestead" is applicable to all such lands as classification thereof, whether inherited lands or lands allotted immediately to the member.

243 That whether this last conclusion be correct or not, the allotments in this instant case, being made to Lah-tah-sah before her death, were subject to such restrictions and are the lands of the deceased Osage allottee, within the meaning of the Act of April, 1912.

That the Honorable Commission and Court overlooked the following statute, decisive of this said case:

The Act of March 3, 1909 (35 Stat. L. 778), which is as follows:

"That the Secretary of the Interior be, and he hereby is, authorized and empowered, upon application, to sell, under such rules and regulations as he may prescribe, part or all of the surplus lands of any member of the Kaw or Kansas and Osage tribes of Indians in Oklahoma: Provided, That the sales of the Osage lands shall be subject to the reserved rights of the tribe in oil, gas, and other minerals."

That such statute, prescribing the manner in which such lands might be sold, impliedly prohibits their sale in any other manner. Stephens v. Smith, 10 Wall. 321, 19 Law Edition, 933.

That the Honorable Commission and Court overlooked the following decisions, decisive of the said case, which were duly submitted:

Goodrum v. Buffalo, 162 Fed., 817;
McKay v. Kalyton, 204 U. S. 458;
U. S. v. Richert, 188 U. S. 432;
U. S. ex rel. West v. Hitchcock, 205 U. S. 80;
Libby v. Clark, 118 U. S. 250.

The decision of the Honorable Commission, affirming the judgment below, is based upon erroneous deductions of fact and erroneous conclusions of law; that such decision is further erroneous for the reason that it is upon the theory that the lands involved were not allotted to the said Lah-tah-sah, when the case was tried and decided in the county and district courts, and all the proceedings below in the case are, upon the theory that the lands involved belonged to and were a part of the estate of the decedent and were the allotments of the decedent as a member of the Osage Tribe of Indians; and plaintiff is not entitled to change the theory of the case after the case reached this court.

244 Plaintiff in error alleges and claims that under an Act entitled "An Act Supplementary to and Amendatory of the Act Entitled 'An Act for the Division of the Lands and Funds of the Osage Nation of Indians in Oklahoma', approved June 28, 1906, and for other purposes", approved April 18, 1912, being Sections 1 to 11 inclusive (37 Stat. L. 86-88), and particularly under Section 6 of such Act, providing "that from and after the approval of this Act, the lands of deceased Osage allottees, unless the heirs agree to partition the same, may be partitioned or sold upon proper order of any court of competent jurisdiction in accordance with the laws of the State of Oklahoma: Provided, That no partition or sale of the restricted lands of deceased Osage allottees shall be valid until approved by the Secretary of the Interior", this plaintiff in error is not bound by the said judgment pleaded as res adjudicata until the same is approved by the Honorable Secretary of the Interior, nor by the judgment in the instant case based thereon, until the same is approved by the Honorable Secretary of the Interior, and that this suit draws in question the validity of such statute of the United States, and of the authority exercised thereunder, or to be exercised thereunder, by the Honorable Secretary of the Interior; and to affirm said judgment will deprive this plaintiff in error of the protection of said statute and of the authorty exercised thereunder by the United States and by the Honorable Secretary of the Interior; and that the said proceeding is repugnant to the Constitution and laws of the United States and is not binding upon this plaintiff in error.

And, further, that this said suit draws in question the validity of the Statutes of Oklahoma relating to the procedure of the county and district courts, and the authority of the county and district courts of Osage County, exercised under the laws of the State, and that the authority so exercised and the decision that said judgment

245 pleaded as res adjudicata is res adjudicata of the issues involved in the instant case, is repugnant to the Constitution, treaties and laws of the United States, and particularly is repugnant to Section 6 of the above-entitled Act of April 18, 1912; and that under said Act of April 18, 1912 the said judgment of the District Court of Osage County, Oklahoma, partitioning said lands, and which has not been approved by the Honorable Secretary of the Interior, is null and void; it has no validity, and to enforce the same against this plaintiff in error, as was done in the trial of the instant case in the court below, denies this plaintiff in error the protection of

the Constitution and laws of the United States and of the treaties made with the Osage Indian Nation, and particularly of the protection given this plaintiff in error under and by virtue of said above-entitled Act of April 18, 1912.

Wherefore, for all the errors and irregularities aforesaid, this plaintiff in error prays that he be given a rehearing in the above-entitled cause, that the decision of affirmance be set aside, and that said cause be heard again, and that the judgment appealed from and complained of be reversed.

Dated this 15th day of January, 1917.

E. R. HASTINGS,
EMBRY, CROCKETT & JOHNSON,
JOHN EMBRY,
Attorneys for Plaintiff in Error.

246 And thereafter, to-wit, on January 30th 1917, in the Supreme Court of the State of Oklahoma, the following proceedings were had, in said cause:

Supreme Court, January Term, 1917, January 30th, 1917, Twelfth Judicial Day.

7708.

JOHN KENNY, Plaintiff in Error,

vs.

LABAN MILES et al., Defendants in Error.

And now on this day it is ordered by the court that the petition for rehearing filed in the above cause be, and the same is hereby denied.

247 And thereafter, to-wit, on February 14th 1917, in the Supreme Court of the State of Oklahoma, the following proceedings were had, to-wit:

In the Supreme Court of the State of Oklahoma.

7708.

JOHN KENNY, Plaintiff in Error,

vs.

LABAN MILES et al., Defendants in Error.

And now on this Feb. 14 1917, it is ordered by the court that the mandate of this court in the above cause be recalled, and stayed pend-

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ng consideration and decision of application for leave to file second etition for rehearing.

48 In the Supreme Court of the State of Oklahoma.

Certificate of Clerk.

I, William M. Franklin, Clerk of the Supreme Court of the State f Oklahoma, do hereby certify that the foregoing 247 pages, num-ered from 1 to 247, both inclusive, are a full, true and complete ranscript of the record and all proceedings in said Supreme Court n cause Number 7708, John Kenny, Plaintiff in error, versus Leban Miles and John L. Bird, Administrator of the Es-ate of Lah-tah-sah, Osage Allottee No. 256, deceased, Defendants in error.

In Witness Whereof, I hereto set my hand and affix the seal of said Supreme Court, at Oklahoma City, Oklahoma, this 12th day of April, 1917.

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk Supreme Court of Oklahoma,
By G. C. STONE, *Deputy.*

CLOSE IN CENTER

248a UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Oklahoma, Greeting:

Being informed that there is now pending before you a suit in which John Kenny is plaintiff in error, and Laban Miles and John L. Bird, Administrator of The Estate of Lah-Tah-Sah, deceased, are defendants in error, No. 7708, which suit was removed into the said Supreme Court by virtue of a writ of error to the District Court of Osage County, State of Oklahoma, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed
248b into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fourth day of May, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Filed Jun- 26, 1917. William M. Franklin, Clerk.

[Endorsed:] File No. 25,923. Supreme Court of the United States, No. 1093, October Term, 1915. John Kenny vs. Laban Miles et al., etc. Writ of Certiorari.

248c In the Supreme Court of the State of Oklahoma.

No. 7708.

JOHN KENNY, Plaintiff in Error,

v.

LABAN MILES and JOHN L. BIRD, Administrator of the Estate of Lah-tah-sah, Osage Allottee No. 256, Deceased, Defendants in Error.

I, William M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the transcript of record hereto attached is a full true and complete transcript of the record and of all proceedings in the Supreme Court of the State of Oklahoma in cause Number 7708, John Kenny, Plaintiff in error, versus Laban Miles, and John L. Bird, Administrator of the estate of Lah-tah-sah, Osage Allottee No. 256, deceased, in said court, and the same is re-

turned herewith; and in pursuance of the command of the foregoing writ of certiorari I now hereby certify that on the 26th day of June, 1917, there was filed in my office a stipulation in the above entitled case in the following words to-wit:

"In the Supreme Court of the State of Oklahoma.

No. 7708.

JOHN KENNY, Plaintiff in Error,

v.

LABAN MILES and JOHN L. BIRD, Administrator of the Estate of Lah-tah-sah, Osage Allottee No. 256, Deceased, Defendants in Error.

Stipulation.

It is hereby stipulated that the transcript of record in the above entitled case already filed in the Clerk's office of the Supreme Court of the United States, with the petition for writ of certiorari,
248*d* and certified transcript of the motion of defendants in error in the Supreme Court of the State of Oklahoma to dismiss the appeal and of the response of plaintiff in error thereto, and of defendants in error's response to petition for rehearing, and of the application of plaintiff in error for leave to file a second petition for rehearing in the Supreme Court of the State of Oklahoma and of the response of defendants in error thereto, and of the order of the Supreme Court of the State of Oklahoma denying said application for leave to file a second petition for rehearing and correcting a date in said opinion, and of said opinion as finally corrected, be taken as a return to said writ of certiorari.

Witness our hands this 13th day of June, 1917.

ELMER L. FULTON,
JOHN EMBRY,
Attorneys and Counsel for John Kenny, Plaintiff in Error.
H. P. WHITE,
Attorney for Counsel for Laban Miles, Defendant in Error."

I further certify and return that the above is a true and correct copy of said stipulation and the whole thereof, and that the transcript of record returned herewith is a full, true and complete transcript of record in the above entitled case as shown by the record of this office, and is the same as the transcript filed in the clerk's office of the Supreme Court of the United States with the petition for Writ of certiorari, with the additions thereto as mentioned in and required by said stipulation.

In witness whereof I, hereto set my hand and affix the seal of said Supreme Court, at Oklahoma City, Oklahoma, this 3rd day of July, 1917.

[Seal Supreme Court, State of Oklahoma.]

WILLIAM M. FRANKLIN,
Clerk of Supreme Court of Oklahoma,
By NEAL ORR, *Deputy.*

248½ In the Supreme Court of the State of Oklahoma.

Filed Dec. 7, 1915. William M. Franklin, Clerk.

No. 7708.

JOHN KENNY, Plaintiff in Error,

vs.

LABAN MILES and JOHN L. BIRD, Administrator of the Estate of Lah-tah-sah, Osage Allottee #256, Deceased, Def'ts in Error.

Notice of Motion to Dismiss.

To John Kenny, Plaintiff in Error, and to John Embry, E. R. Hastings, and to Paul Van Winkle, his Attorneys of Record:

You and each of you will take notice that defendant in error, Laban Miles, will on the 7th day of December, 1915, file a motion to dismiss the appeal in the above entitled cause, a copy of said motion and of all the exhibits thereto attached is tendered herewith, this 7th day of December, 1915.

H. P. WHITE,
Attorney for Defendant in Error,
Laban Miles.

Service of the within and foregoing notice of Motion to Dismiss, and the receipt of a carbon copy thereof, and the receipt of a carbon copy said Motion to Dismiss with copies of all the exhibits thereto attached, is hereby acknowledged this the 7th day of December, 1915.

E. R. HASTING,
PAUL VAN WINKLE,
JOHN EMBRY,
Attorneys for John Kenny,
Plaintiff in Error.

249 In the Supreme Court of the State of Oklahoma.

No. —.

JOHN KINNY, Plaintiff in Error,

vs.

LABAN MILES and JOHN L. BIRD, Administrator of the Estate of Lah-tah-sah, Osage Allottee #256, Deceased, Defendants in Error.

Motion to Dismiss Appeal.

Comes now Laban Miles, one of the defendants in error in the above entitled cause, and moves the Court to dismiss the above entitled cause and the attempted appeal, by John Kinny, plaintiff in error, for want of jurisdiction, and for grounds of motion, states

First. That the administrator of the estate of Lah-tah-sah, Osage allottee No. 256, deceased, is a necessary party but has not been made a party.

Second. That said John L. Bird was discharged by the county court of Osage County, Oklahoma, as administrator of the estate of said Lah-tah-sah, Osage Allottee, No. 256, deceased, on the 20th day of May, 1915, and one W. O. Dildine was, on the 20th day of May, 1915, duly appointed and qualified as the administrator of said estate of said Lah-tah-sah, deceased, to succeed the said John L. Bird, as such administrator, and has not been made a party to this appeal.

Third. That the case-made was not served on W. O. Dildine, administrator of the estate of said Lah-tah-sah, deceased, nor on John L. Bird, former administrator, nor on their attorneys, or any
250 of them, and service of said case-made was not waived by said W. O. Dildine, administrator, nor by said John L. Bird, former administrator, nor by their attorneys, nor by any of them.

Fourth. That no notice of time and place to settle and sign said case-made was ever served on W. O. Dildine, administrator of the estate of the said Lah-tah-sah, deceased, nor on John L. Bird, former administrator of said estate, nor on their attorneys or any of them, nor was such notice waived by said W. O. Dildine, administrator, nor by said John L. Bird, former administrator, nor by their attorneys, or any of them.

Fifth. That neither said W. O. Dildine, administrator of the estate of said Lah-tah-sah, deceased, nor said John L. Bird, former administrator of the estate of said Lah-tah-sah, deceased, appeared in person, or by attorney, and neither were present in person or by attorney, at the time of settling and signing the case-made, and only the said John Kinny and the said Laban Miles appeared, or were present or represented at the time of settling and signing said case-made as fully appears by the certificate of the trial judge. (Record, page 129.)

That an appeal was taken by said John Kinny from the county court of Osage County, Oklahoma, to the District court of Osage County, Oklahoma, from the judgment rendered by the county court of Osage county, Oklahoma, on the hearing of the final account of said administrator, part of which judgment reads: "It is therefore ordered, adjudged and decreed by the court that
251 the final account of John L. Bird, administrator of said estate, be, and the same hereby is, by the Court approved. (Record, p-. 27-28.)

Sixth. That the attempted appeal by plaintiff in error in the above entitled cause, is from a judgment of the District Court of Osage County, Oklahoma, rendered on the 2nd day of April, 1915, which in part reads: "The above entitled matter came on regularly for hearing * * * upon the final account of John L. Bird, administrator, with the exceptions filed thereto by appellant, John Kinny * * * and the court having heard the evidence and the argument of counsel and being fully advised in the premises finds that the final account rendered by John L. Bird, administrator of the estate of said Lah-tah-sah, deceased, is true and correct; that said administrator has made no profit out of the estate and has made disbursements as stated in said account and statement of disbursements since rendition of said final account and that said disbursements should be approved." (Record, pp. 100-103, reading on 100.)

Seventh. That the contest in the County court of Osage County, Oklahoma, and the contest in the District Court of Osage County, Oklahoma, on appeal from the county court, was on exceptions to final account of the administrator and the administrator was a necessary part to the appeal, but has not been made so.

In support of the above mentioned grounds for dismissal we submit the following:

(A) That on the 28th day of January, 1914, John L.
252 Bird, then administrator of the estate of said Lah-tah-sah, Osage Allottee No. 256, deceased, filed in the county court of Osage County, Oklahoma, his final account, showing balance in his hands, subject to distribution, the sum of $210.00, and alleging that he was informed and believed that the heirs of said Lah-tah-sah and their respective interests were Laban Miles, surviving husband, one-half, John Kinny, son, one-half, and asking that he be allowed to make distribution accordingly and be discharged, as shown by certified copy thereof hereto attached and marked "Exhibit A" and made a part of this motion.

(B) That on the 28th day of Feb., 1914, the plaintiff in error, John Kinny, filed objections and exception to the report of administrators as per certified copy thereof hereto attached, marked "Exhibit B," and made a part of this motion.

(C) Said John L. Bird, former administrator of the estate of said Lah-tah-sah, deceased, filed in the county court of Osage county Oklahoma, his written resignation as such administrator on the 31st day of December, 1914, as per certificate thereof hereto attached marked "Exhibit C," and made a part of this motion.

(*d*) That on the 2nd day of January, 1915, the County Court of Osage County, Oklahoma, made an order accepting the resignation of John L. Bird as such administrator and ordered that said administrator file an account covering his administration since last report, a certified copy of which said order is hereto attached, marked Exhibit B, and made a part of this motion.

253 (E) That on the 3rd day of February, 1915, said John L. Bird, as such administrator, filed his account, as per order of Court, covering a period of time from January 23rd, 1914, to January 13, 1915, as per certified copy thereof hereto attached marked "Exhibit C" and made a part of this motion.

(*f*) That on the 22nd day of March, 1915, said John L. Bird, administrator of the estate of said Lah-tah-sah, deceased, filed in the County Court of Osage County, Oklahoma, his petition praying that W. O. Dildine of Pawhuska, Oklahoma, be appointed administrator of the estate of said Lah-tah-sah, deceased, as per certified copy thereof hereto attached, marked "Exhibit F" and made a part of this motion.

(G) That on the 22nd day of March, 1915, Thos. Leahy, Court Clerk by A. B. Cotter, Deputy, issued notice of application for appointment of W. O. Dildine as administrator of the estate of Lah-tah-sah, deceased, which said notice was posted as provided by law, as shown by certified copy of said notice hereto attached, marked "Exhibit G" and made a part of this motion.

(H) That on the 20th day of May, 1915, the county court of Osage county, Oklahoma, Elmer J. Black, County Judge, made an order discharging John L. Bird as administrator of the estate of Lah-tah-sah, deceased, and made an order appointing W. O. Dildine, administrator of the said estate of said Lah-tah-sah, deceased, to succeed the said John L. Bird, as administrator of said estate, as shown by certified copy thereof hereto attached, marked "Exhibit H," and made a part of this motion.

254 (I) That on the 20th day of May, 1915, letters of administration were issued to said W. O. Dildine, as administrator of the estate of said Lah-tah-sah, deceased, and on said 20th day of May, 1915, said W. O. Dildine made oath that he would perform according to law the duties of administrator of the estate of Lah-tah-sah, deceased, which said letters of administration and oath were filed in the county court of Osage county, Oklahoma, on May 20th, 1915, and recorded in Administrator Record Book 1, page 540, as shown by certified copy thereof hereto attached, marked "Exhibit I," and made a part of this motion.

(J) That on the 20th day of May, 1915, said W. O. Dildine qualified as the administrator of the estate of said Lah-tah-sah, deceased, by executing a bond to the State of Oklahoma in the penal sum of $500.00 with two good and sufficient sureties, each qualifying for the full amount of said bond, and which said bond was on the 20th day of May, 1915, approved by Elmer J. Black, County Judge, of Osage County, Oklahoma. The said bond was filed in the County Court on the 20th day of May, 1915, and recorded in Adm. Bond

Record 1, page 357, as shown by a certified copy thereof hereto attached, marked "Exhibit J," and made a part of this motion.

255 (K) That on the 20th day of May, 1915, said W. O. Dildine, the duly appointed, qualified, and acting administrator of the estate of said Lah-tah-sah, deceased, the successor of John L. Bird, resigned, receipted the said John L. Bird for the sum of $169.25, balance in the hands of the said John L. Bird, resigned, belonging to the estate of said Lah-tah-sah, deceased, which said receipt was filed in the county court of Osage county, Oklahoma, on the 21st day of May, 1915, as shown by certified copy thereof hereto attached and marked "Exhibit K," and made a part of this motion.

That said John L. Bird was discharged as administrator of said estate and said W. O. Dildine appointed administrator of said estate, and qualified as such on the 20th day of May, 1915.

That notice of settlement of case-made was served on H. P. White, attorney for Laban Miles on July 6th, 1915, but said case-made was not served on W. O. Dildine, administrator, nor on John L. Bird, former administrator (Record p. 117).

That on July 6th, 1915, the trial judge made an order in which it is stated that: "Said John Kenny by his attorneys has served Laban Miles the appellee in said cause and H. P. White, attorney for said Laban Miles, with notice in writing that they will present said case-made" at a time and place named for settlement and signing, but there was no finding that any notice of same had been served on the administrator of said estate or any other person (Rec. p. 119).

256 That on July 12th, 1915, said case-made was signed and settled without notice to the administrator, and without appearance by said administrator, and without said administrator being present either in person or by attorney.

That W. O. Dildine, the duly appointed, qualified and acting administrator of the estate of said Lah-tah-sah deceased, since May 20th, 1915, has not been made a party to the proceeding in error, and has been served with no summons in error, and has not waived summons in error, and has made no appearance, and by reason of the foregoing the Honorable Supreme Court is without jurisdiction.

H. P. WHITE,
Attorney for Laban Miles.

257 EXHIBIT A.

STATE OF OKLAHOMA,
Osage County, ss:

In the County Court of said County.

To the Judge of said Court:

To The undersigned, as the administrator of the estate of Lah-tah-sah, Osage Allottee No. 256 deceased, respectfully submits the following as a full and correct account and report of his adminis-

tration as such admr. from November 20, 1912 to the 23rd day of January, 1914, which account exhibits not only the debts which have been paid, but also contains a statement of all the debts which have been presented and allowed during the period embraced to this account.

I charge Myself with the following, to-wit:

Dec. 11, 1912—Lease	$240.00
Total amount of moneys received or collected	$240.00

Contra.

I ask myself to be credited with the following payment to creditors of deceased, as per voucher herewith submitted.

No. 20, 1912—Premium on Surety Bond	$15.00	
No. 20, 1913— " " " "	15.00	
Total amount received		$240.00
Total amount paid out		30.00
Balance due		$210.00

(Signed) JOHN L. BIRD.

STATE OF OKLAHOMA,
Osage County, ss:

Jno. L. Bird being duly swom, on *otah* says, that he has read the foregoing account and report of his administration, as the admr. of the estate of Lah-tah-sah, Osage Allottee 256 deceased, and knows the contents thereof, and that the same are true and correct.

JOHN L. BIRD.

258 Duplicate of True Copy.

STATE OF OKLAHOMA,
Osage County, ss:

I, Thos. Leahy, Court Clerk, in and for the County and State aforesaid, do hereby certify that the instrument hereto attached is a full, true and correct copy of Final Account as the same now appears of record at this office.

Witness my hand and the seal of said Court at Pawhuska, Oklahoma, on this 6 day of Dec., 1915.

[SEAL.] THOS. LEAHY,
Court Clerk,
By A. R. COTTER, *Deputy.*

259 Subscribed and sworn to before me, this 24th day of January, 1914.

[SEAL.] C. F. LAKE,
Notary Public.

My Commission expires Mar. 7, 1915.

Your administrator (executor) further reports that the debts and claims against said estate have all been paid, leaving the above balance to be distributed between the parties lawfully entitled thereto; Your administrator (executor) therefore petitions the Court to determine and find the heirs of said estate, which he is informed and believes to be the following named persons and entitled to said estate as follows:

Laban Miles, surviving husband, One-half;
John Kenny, son, One-half;

now moves the court that said heirs be determined and be allowed to make distribution of said estate, and take receipts therefor, and present the same to this Court and be discharged; all of which is respectfully submitted.

JOHN L. BIRD.

Subscribed and sworn to before me this 24th day of January A. D. 1914.

[SEAL.] C. F. LAKE,
Notary Public.

My Commission expires Mar. 7, 1915.

Statement of Claims presented and allowed, none.
Total amount of claims allowed, none.
Very respectfully submitted, this 24th day of Jan. 1914.

JOHN L. BIRD,
Administrator.

Indorsed: Original. No. 389. Final Account of Administrator, or Executor. In County Court, of Osage County, Oklahoma. In the Matter of the Estate of Lah-tah-sah, deceased. Final account of Jno. L. Bird, adm'r. Filed Jan'y 28, 1914. Belva L. Moore, Clerk.

Service of within account and receipt of copy thereof acknowledged this 15th day of Jan. 1914.

JAMES A. CARRALL,
Supt. Osage Agency,
Per F. A. B.

260 EXHIBIT B.

In the County Court of Osage County, Oklahoma.

In the Matter of THE ESTATE OF LAH-TAH-SAH, Deceased.

Objection, Motion, and Application of John Kinny.

Comes now John Kinny, son of the decedent, and alleges that he is the sole and only heir at law of said Lah-tah-sah, that he is the son of such decedent, that Laban Miles is not an heir of said

decedent; and this said John Kinny objects and excepts to the final report of the administrator herein in that said report suggests that Laban Miles is an heir of such decedent, when in truth and in fact he is not.

Wherefore, the said John Kinny prays that this court inquire, ascertain and determine that the said Laban Miles is not an heir and has no interest in said estate, and that said John Kinney, is the sole and only heir and that the whole of said estate be distributed to him and that said report be amended accordingly.

JOHN KINNY,
By JOHN EMBRY,
His Attorney.

Endorsed: No. 389. In the matter of the estate of Lah-tah-sah, deceased. Objection, Motion and Application of John Kinny. Service accepted this 28th day of Feb. 1914. James A. Carrall, Supt. Osage Agency, by F. A. Baker. State of Oklahoma, County of Osage. Pawhuska, Okla. Filed Feb. 28, 1914. Belva L. Moore, Clerk County Court.

261 Duplicate of True Copy.

STATE OF OKLAHOMA,
Osage County, ss:

I, Thos. Leahy, Clerk in and for the County and State aforesaid, do hereby certify that the instrument hereto attached is a full, true and correct copy of Objection to final account, as the same now appears of record at this office.

Witness my hand and the seal of said Court, at Pawhuska, Oklahoma, on this 6 day of Dec. 1915.

THOS. LEAHY,
Court Clerk,
[SEAL.] By A. B. COTTER, *Deputy.*

262 EXHIBIT C.

In the County Court of Osage County, Oklahoma.

No. 389.

In the Matter of THE ESTATE OF LAH-TAH-SAH, Deceased; JOHN L. BIRD, Administrator.

Resignation of Administrator.

Comes now John L. Bird, administrator of the estate of the said Lah-tah-sah, deceased, and tenders his resignation as such administrator.

Wherefore your administrator asks that he be relieved from duty as said administrator as soon as possible.

JOHN L. BIRD,
By GRINSTEAD & SCOTT,
His Attorneys.

STATE OF OKLAHOMA,
County of Osage, ss:

I hereby certify that a full true and correct copy of the above and foregoing was this 31st day of December, 1914, filed in my office.

[SEAL.]

J. A. CARROLL,
By A. T. W., *Supt.*

Indorsed: No. 389. In the County Court of Osage County, Oklahoma. In the matter of the Estate of Lah-tah-sah, Deceased. Resignation of Administrator. State of Oklahoma, Osage County, Pawhuska, Okla. Filed Dec. 31, 1914. Belva L. Moore, Clerk County Court. Grinstead & Scott, Pawhuska, Okla., Attorneys for Administrator.

263 Duplicate of True Copy.

STATE OF OKLAHOMA,
Osage County, ss:

I, Thos. Leahy, Court Clerk, in and for the County and State aforesaid, do hereby certify that the instrument hereto attached is a full, true and correct copy of Resignation of Administrator as the same now appears of record at this office.

Witness my hand and the seal of said Court at Pawhuska, Oklahoma, on this 6 day of Dec. 1915.

THOS. LEAHY,
Court Clerk,
By A. B. COTTER, *Deputy.*

264 EXHIBIT D.

In the County Court, Osage County, Oklahoma.

In the Matter of THE ESTATE OF LAH-TAH-SAH, Deceased; JOHN L. BIRD, Administrator.

Order for Administrator to File Final Account.

Now on this 2d day of January, 1915, John L. Bird, administrator having filed his resignation as such administrator, said application comes on for the consideration of the Court, and the Court after considering same hereby accepts such resignation, orders and directs that said administrator file a final account covering his administra-

tion since last report, and that said account be filed as soon as possible.

PAUL B. MASON, [SEAL.]
County Judge, Osage County, Oklahoma.

Indorsed: No. 389. In the —— Court, Osage County, Oklahoma. State of Oklahoma, Osage County, Pawhuska, Okla. Filed Jan. 2, 1915. Belva L. Moore, Clerk County Court, Grinstead & Scott, Pawhuska, Okla., Attorneys for —— ——. P. J. 4-P. 63.

Duplicate of True Copy.

STATE OF OKLAHOMA,
Osage County, ss:

I, Thos. Leahy, Court Clerk, in and for the County and State aforesaid, do hereby certify that the instrument hereto attached is a full, true and correct copy of Order for Admr. to file accounts as the same now appears of record at this office.

Witness my hand and the seal of said court at Pawhuska, Oklahoma, on this 6 day of Dec. 1915.

THOS. LEAHY,
Court Clerk,
[SEAL.] By A. B. COTTER, *Deputy.*

265 In the County Court, Osage County, Oklahoma.

No. 389.

In the Matter of THE ESTATE OF LAH-TAH-SAH, Deceased; Osage Allottee No. 256.

Final Report of Administrator In Re Administrator's Resignation.

The undersigned administrator of the estate of Lah-tah-sah, deceased, respectfully submits the following as a full and correct statement and report of his administration from January 23d, 1914, as shown by his final report, to January 13, 1915.

January 23, 1914, amount on hand as shown by last report, less amount of statement of disbursements filed and approved by court since filing final account.....	$185.00
Total amount received.....	185.00
Dec. 31, 1914, Administrators' commission and fees, as per Court order	12.00
Administrators' Bond, Title Guaranty & Surety Company, 1914 term	3.75
Total amount paid out.....	$15.75

Total amount received..... $185.00
Total amount paid out..... 15.75

Balance on hand..... 169.25

There are no other assets in hands of administrator or due the estate.

That the heirs in said estate have been determined by the County Court but an appeal has been taken and the case is now pending on appeal.

266 PAWHUSKA, OKLA., Jan. 12, 1915. No. —.

Citizens National Bank. 86-186.

Pay to John L. Bird, or Order..... $12.00
Twelve & 00/100 ..... Dollars

LAH-TAH-SAH #256.

JOHN L. BIRD, *Administrator.*

Administrator Fees by order of Court.

[Written across face:] Citizens National Bank. Paid Jan. 12, 1915. Pawhuska, Okla.

267 MUSKOGEE, OKLA., 1/13/15.

Mr. John Bird, G'd'n Lah-tah-sah, #256, to The Title Guaranty & Surety Company, Dr.

Home Office: Scranton, Pennsylvania.

To pt. 3rd year premium on Bond No. J42881..... $3.75

Rec'd payment,

EDW. C. GRIESEL, *Trustee.*

To 2/14/15.

268 EXHIBIT E.

Wherefore, your administrator prays that said report be set for hearing on a day certain and that upon said hearing that said report be approved and that he be discharged from further duty in said cause and his official bond released and his resignation accepted.

JOHN L. BIRD,
Administrator.

STATE OF OKLAHOMA,
County of Osage, ss:

John L. Bird, administrator of the estate of Lah-tah-sah, deceased, being duly sworn says that the foregoing is a full, true and complete statement and report of his administration of said estate and all moneys received and paid out since his last report from January 23d, 1914, to January 13, 1915.

[SEAL.]

JOHN L. BIRD,
Administrator.

Subscribed and sworn to before me this 14th day of January, 1915.

ANDREW JOYCE,
Notary Public, Osage County, Okla.

My commission expires: Nov. 21, 1918.

Copy of report filed in my office this 3rd day of January, 1915.

W. F. HAYGOOD,
Act'g Supt. Osage Agency, A. T. W.

Indorsed: No. 389. In the County Court, Osage County, Okla. In re Lah-tah-sah, deceased. Final report in re resignation of administrator. County Court. State of Oklahoma, Osage County. Pawhuska, Okla. Filed Feb. 3, 1915, by A. B. Cotter, Deputy. Grinstead & Scott, Pawhuska, Okla., Attorneys for Administrator.

269 Duplicate of True Copy.

STATE OF OKLAHOMA,
Osage County, ss:

I, Thos. Leahy, Court Clerk, in and for the County and State aforesaid, do hereby certify that the instrument hereto attached is a full, true and correct copy of final account as the same now appears of record at this office.

Witness my hand and the seal of said Court at Pawhuska, Oklahoma, on this 6 day of Dec., 1915.

THOS. LEAHY,
Court Clerk,
By A. B. COTTER, *Deputy.*

270 EXHIBIT F.

In the County Court, Osage County, Oklahoma.

No. 389.

In the Matter of THE ESTATE OF LAH-TAH-SAH, Deceased.

Petition for Letters of Administration.

Comes now John L. Bird, administrator of the estate of Lah-tah-sah, deceased, and states to the court that he desires to resign as such administrator and has filed in this court his resignation; that he is a competent person to suggest the appointment of an administrator of said estate and suggests the appointment of W. O. Dildine, of Pawhuska, Oklahoma, as a competent and proper person to be appointed administrator herein.

Wherefore, your petitioner prays that the said W. O. Dildine of Pawhuska, Oklahoma, be appointed administrator of said estate.

JOHN L. BIRD,
Administrator of the Estate of Lah-tah-sah, Deceased.

Subscribed and sworn to before me this 18th day of March, 1915.

[SEAL.] ANDREW JOYCE,
Notary Public.

My Commission expires Nov. 21, 1918.

I hereby accept service of a copy of the above this 22nd day of March, 1915.

J. GEO. WRIGHT,
Supt. Osage Agency,
A. T. W.

Endorsed: No. 389. County court, State of Oklahoma, Osage County; Pawhuska, Okla. Filed Mar. 22, 1915. Thos. Leahy, Court Clerk, by A. B. Cotter, Deputy. Grinstead & Scott, Pawhuska, Okla., Attorneys for ——.

271 Duplicate of True Copy.

STATE OF OKLAHOMA,
Osage County, ss:

I, Thos. Leahy, Court Clerk, in and for the County and State aforesaid, do hereby certify that the instrument hereto attached is a full, true and correct copy of Petition for Letters as the same now appears of record at this office.

Witness my hand and the seal of said court at Pawhuska, Oklahoma, on this 6th day of Dec. 1915.

[SEAL.] THOS. LEAHY,
Court Clerk,
By A. B. COTTER, *Deputy.*

272 EXHIBIT G.

In the County Court, County of Osage, State of Oklahoma.

In THE ESTATE OF LAH-TAH-SAH, Deceased.

The State of Oklahoma to the Heirs next of Kin, U. S. Indian Superintendent of the Osage Agency, and Creditors of the said Lah-tah-sah, Deceased:

You are hereby notified that John L. Bird has applied for letters of administration of said estate to be granted to W. O. Dildine and that said petition will be heard at the Court room of said court in the city of Pawhuska, in said county and State, on the 10th day of April, 1915, at 9:00 o'clock A. M. at which time you may appear and show cause, if any you have, why said petition should not be granted.

Witness my hand and the Seal of said Court hereunto affixed this 22d day of March, 1915.

[SEAL.]
[SEAL.]
[SEAL.]

THOS. LEAHY,
Court Clerk,
By A. B. COTTER, *Deputy.*

273 STATE OF OKLAHOMA,
Osage County, ss:

I, the undersigned, do solemnly swear that on the 25th day of March, 1915, I posted true copies of the within notice in three public places in Osage county, as follows, one at the Court House in the City of Pawhuska, one at City Hall Bldg. and one at Old Agency Bldg. and served one copy on Supt.

——— ———.

Subscribed and Sworn to before me this 26th day of March, A. D. 1915.

A. B. COTTER, *Deputy.*

No. 389.

In the Matter of THE ESTATE OF LAH-TAH-SAH, Deceased.

Notice of Application for Appointment of Administrator.

Filed in County Court, Osage County, Okla., this M. 26th day of March, 1915.

THOS. LEAHY,
Court Clerk,
By A. B. COTTER, *Deputy*

274 EXHIBIT H.

In the County Court, Osage County, Oklahoma.

No. —.

In the Matter of THE ESTATE OF LAH-TAH-SAH, Deceased.

Order Discharging Administrator and Appointment of Successor.

And now on this 20th day of May, 1915, the above entitled cause comes on for hearing upon the final settlement of John L. Bird for the purpose of resigning as such administrator, and it appearing to the court that hearing of said final report was published as provided in the order of court setting said cause for hearing and return was duly made thereon, the said administrator appearing in person and by his attorneys Grinstead & Scott and the Superintendent of the Osage Agency appearing by A. T. Woodward, the court proceeds to examine said report and after hearing the evidence adduced, argument of counsel and being fully advised in the premises, finds that said administrator has received no funds except those on hand from last report in the sum of $169.25, that he was paid out the sum of $00.00 which expenditures were just and valid charges against said estate and that there remains in the hands of said administrator a balance of $169.25 and it appearing to the court that said administrator has faithfully performed all the duties enjoined upon him as such administrator and there being no objection to the approval of said report, the court finds that said report should be in all things approved.

It is therefore ordered, adjudged and decreed by the Court that said administrators' final account be and the same is hereby approved in all things.

275 And the said John L. Bird, administrator of the estate of the said Lah-tah-sah, deceased, having filed in this court his resignation as such administrator and the said administrator having accounted for all moneys he has received in said estate and there being no objections filed, and the court being fully advised in the premises, finds that said administrator's resignation should be accepted, that he be discharged and his bondsmen released.

It is therefore ordered, adjudged and decreed by the Court that the resignation of the said John L. Bird as administrator of said estate be and the same is accepted and said administrator is discharged as such administrator and his bondsmen on his official bond released, upon his turning over to his suc-essor as such administrator all funds in his hands belonging to the estate of said deceased, and filing in this court receipt therefor.

And now at this time comes on for hearing, the application for the appointment of W. O. Dildine as administrator of the estate of the said Lah-tah-sah, deceased to succeed the said John L. Bird, as administrator of said estate whose resignation as such administrator

has been accepted, and the petitioner appearing in person and by his attorneys Grinstead & Scott and the Osage Superintendent appearing by A. T. Woodward and the Court having read and considered said petition, hearing the evidence, argument of counsel and being fully advised in the premises and it appearing that said petition has been legally set for hearing, finds that said petition should be sustained; that said W. O. Dildine is a proper person to be appointed as such administrator, and there being no objections filed to the granting of said petition,

It is further ordered, adjudged and decreed by the court that said W. O. Dildine be and he is hereby appointed administrator of the estate of said deceased to succeed John L. Bird as administrator of said estate, subject to the approval of bond in the sum of $500.00, that upon the approval of said bond letters of administration issue to the said W. O. Dildine.

276

And now at this time the said John L. Bird, having this day presented to this court, and filed herein, receipt from the said W. O. Dildine as administrator of said estate of all moneys justly due said estate in his hands and that he the said John L. Bird had not received any funds or moneys belonging to said estate nor expended out of the funds in his hands belonging to said estate any funds for any purpose since his final report; that he has performed all the acts which by law and the order of this court were enjoined upon him and that no further acts remain to be performed.

Now on motion of counsel for the said John L. Bird, it is ordered, adjudged and decreed by the court that said John L. Bird as administrator has fully discharged the duties of his trust; that he is hereby wholly and absolutely discharged from all further duties and responsibility as such administrator and that his letters of administration are hereby vacated; and the sureties on his official bond are hereby released from any liability to be hereinafter incurred.

[SEAL.] ELMER J. BLACK,
County Judge of Osage County, Oklahoma.

Endorsed: In the county court of Osage county, Okla., in the matter of Lah-tah-sah, deceased. Order approving final report discharging administrator, and appointing W. O. Dildine administrator. County Court, State of Oklahoma, Osage County, Pawhuska, Okla. Filed May 21, 1915. Thos. Leahy, Court Clerk, by A. B. Cotter, Deputy. Recorded Probate J. 4, P. 189, Grinstead & Scott, Att'y-for John L. Bird, Adm.

277 Duplicate of True Copy.

STATE OF OKLAHOMA,
Osage County, ss:

I, Thos. Leahy, Court Clerk, in and for the County and State aforesaid, do hereby certify that the instrument hereto attached is a full, true and correct copy of Order Discharging Admr. Appointing Successor as the same now appears at this office.

Witness my hand and the seal of said court at Pawhuska, Oklahoma, on this 6 day of Dec. 1915.

THOS. LEAHY,
Court Clerk,
By A. B. COTTER.

278 EXHIBIT I.

Letters of Administration.

STATE OF OKLAHOMA,
Osage County, ss:

In County Court.

Osage Allottee Roll No. —.

In the Matter of THE ESTATE OF LAH-TAH-SAH, Deceased.

W. O. Dildine is hereby appointed administrator of the estate of Lah-tah-sah, Deceased.

Witness; Elmer J. Black, Judge of the County Court of Osage County, State of Oklahoma, with the seal thereof, affixed the 20th day of May, 1915.

[SEAL.]

ELMER J. BLACK,
County Judge.

STATE OF OKLAHOMA,
Osage County, ss:

I, W. O. Dildine, do solemnly swear that I will perform according to law, the duties of administrator of the estate of Lah-tah-sah Deceased, so help me God.

W. O. DILDINE.

Subscribed and sworn to before me this 20th day of May, 1915.

[SEAL.]

A. B. COTTER,
Deputy Court Clerk.

279 Endorsed on Back.

STATE OF OKLAHOMA,
County of Osage, ss:

I, Thos. Leahy, Jr., Court Clerk, in and for the County and state aforesaid, do hereby certify that the foregoing instrument is a full true and correct copy of the letters of Administration in the matter of the Estate of Lah-tah-sah, deceased, issued to W. O. Dildine, as the same now appears of record in this office.

Witness my hand and Seal at Pawhuska, Oklahoma, on this — day of May, 1915.

——— ———,
Clerk of County Court.

Original, No. 389.

In the Matter of the THE ESTATE OF LAH-TAH-SAH, Deceased.

Letters of Administration.

Filed May 20th, 1915.

THOS. LEAHY,
Clerk of County Court.
A. B. COTTER, *Dep.*

Recorded in Administrator's Record Book 1, page 540.

Duplicate of True Copy.

STATE OF OKLAHOMA,
Osage County, ss:

I, Thos. Leahy, Court Clerk, in and for the county and State aforesaid, do hereby certify that the instrument hereto attached is a full, true and correct copy of letters of Administration at the same now appears of record at this office.

Witness my hand and the seal of said court at Pawhuska, Oklahoma, on this 6 day of Dec., 1915.

[SEAL.]

THOS. LEAHY,
Court Clerk,
By A. B. COTTER, *Deputy.*

280 EXHIBIT J.

Administrator's or Executor's Bond.

STATE OF OKLAHOMA,
Osage County, ss:

In the County Court.

In the Matter of THE ESTATE OF LAH-TAH-SAH, Deceased.

Know all men by these presents, that we W. O. Dildine as principal and Ed. T. Kennedy and B. P. McDonald as sureties, are held and firmly bound unto the State of Oklahoma, in the penal sum of Five Hundred ($500.00) Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns jointly and severally by these presents.

The condition of the above obligation is such that Whereas, by order of the County Court of Osage County, State of Oklahoma, made and entered on the 20th day of May, A. D. 1915, the above named principal was appointed Administrator of the estate of Lah-

tah-sah, deceased, and letters of Administration were directed to issue to said principal upon his taking and subscribing the oath required by law, and executing a bond to the State of Oklahoma, in the penal sum of Five Hundred Dollars, with two or more sureties to be approved by the Judge of said Court. This bond is subject to all the conditions in Section 3 of the Act of Congress approved April 18, 1912, amendatory of the Osage Allotment Act of June 28, 1906, and the provisions of said section are made a part hereof.

Now, if the above bounden principal shall faithfully execute the duties of such trust as such administrator according to law, then this obligation to be void, otherwise to remain in full force and effect.

In Witness whereof, we have hereunto subscribed our names, this 20th day of May, A. D. 1915.

W. O. DIDDINE.
ED. T. KENNEDY.
B. P. McDONALD.

281 STATE OF OKLAHOMA,
Osage County, ss:

The undersigned, sureties on the foregoing bond, being duly sworn, on oath each for himself says: I am a resident householder and freeholder within the State of Oklahoma, and have property within said state worth over and above all my just debts and liabilities, exclusive of property exempt from execution, the sum set out and stated below, that is to say:

Ed. T. Kennedy.....Am worth the sum of $500.00
B. P. McDonald.....Am worth the sum of $500.00

ED. T. KENNEDY.
B. P. McDONALD.

Subscribed and sworn to before me this 20-h day of May, 1915.

[SEAL.] A. B. COTTER,
Dep. Court Clerk.

I hereby approve the above bond this 20th day of May, 1915.

[SEAL.] ELMER J. BLACK,
County Judge.

Duplicate of True Copy.

STATE OF OKLAHOMA,
Osage County, ss:

I, Thos. Leahy, Court Clerk, in and for the county and state aforesaid, do hereby certify that the instrument attached is a full, true and correct copy of Admr. Bond as the same appears of record at this office.

Witness my hand and the seal of said court at Pawhuska, Oklahoma, on this 6 day of Dec., 1915.

[SEAL.]

THOS. LEAHY,
Court Clerk,
By A. B. COTTER, *Deputy.*

282 Endorsed: No. 389. In the County Court of Osage County. Bond. Estate of Lah-tah-sah, Deceased. Filed this 20 day of May, 1915. Thos. Leahy, Court Clerk, by A. B. Cotter, Deputy Clerk. Recorded Adm. Bond Rec. 1, P. 357.

283 EXHIBIT K.

In the County Court, Osage County, Oklahoma.

No. 389.

In the Matter of THE ESTATE OF LAH-TAH-SAH, Deceased.

Receipt.

I, W. O. Dildine, the duly appointed, qualified and acting administrator of the estate of Lah-tah-sah and successor of John L. Bird, resigned, hereby acknowledge receipt of the sum of $169.25 from the said John L. Bird.

Dated this 20th day of May, 1915.

W. O. DILDINE,
Administrator.

STATE OF OKLAHOMA,
County of Osage, ss:

I hereby certify that a copy of the within and foregoing was this 20th day of May, 1915, filed in my office.

J. GEO. WRIGHT,
Superintendent Osage Agency.
A. T. W.

Endorsed: No. 389. In the county court of Osage county, Oklahoma. In the matter of the estate of Lah-tah-sah, Deceased. Receipt from W. O. Dildine, admin. County Court, State of Oklahoma, Osage County, Pawhuska, Okla. Filed May 21, 1915. Thos. Leahy, Court Clerk, by A. B. Cotter, Deputy.

Duplicate of True Copy.

STATE OF OKLAHOMA,
Osage County, ss:

I, Thos. Leahy, Court Clerk, in and for the county and state aforesaid, do hereby certify that the instrument hereto attached is

a full, true and correct copy of Receipt as the same now appears at this office.

Witness my hand and the seal of said court at Pawhuska, Oklahoma, on this 6th day of Dec., 1915.

[SEAL.] THOS. LEAHY,
Court Clerk,
By A. B. COTTER, *Deputy.*

284 Endorsed: No. 7708. In the Supreme Court of Oklahoma. John Kenny Plaintiff in Error vs. Laban Miles et al., Defendants in Error. Motion to Dismiss. H. P. White, Pawhuska, Okla., Att'y for Laban Miles.

285 In the Supreme Court of the State of Oklahoma.

No. 7708.

JOHN KENNY, Plaintiff in Error,

vs.

LABAN MILES, and JOHN L. BIRD, Administrator of the Estate of LAH-TAH-SAH, Deceased, Osage Allottee, #256, Defendants in Error.

Response and Brief Resisting Motion to Dismiss Appeal.

Comes now John Kenny, plaintiff in error, herein, and in this, his response and answer to the motion of defendant in error, Laban Miles, to dismiss the appeal in said cause, alleges and states:

(1.) Said plaintiff in error avers and states that the administrator of the estate of Lah-tah-sah, Osage Allottee, #256, deceased, is not a necessary party to this suit or proceedings, or to this appeal; that this suit is a contest of heirship between the plaintiff in error, John Kenny and the defendant in error, Laban Miles, and that the administrator of the estate of Lah-tah-sah, deceased, has no interest, whatever in the outcome or final determination of this action; that no objection or exception is taken by the said plaintiff in error, John Kenny, to the correctness of the final report or account of the administrator, of said estate and that no issue is made on the correctness of said account and exceptions are taken only to the opinion

286 and recommendation of said administrator as to the heirs, and the only reference to said administrator's report is a prayer that said report be amended to show that the said plaintiff in error, John Kenny, is the sole and only heir at law of the said Lah-tah-sah, deceased.

That the final report of the administrator after stating his opinion that defendant in error, Laban Miles, is an heir of Lah-tah-sah, deceased, contains an application to the court to determine the heirs as follows:

"Now moves the court that said heirs be determined," (See Exhibit "A" attached to plaintiff in error's motion to dismiss)

and plaintiff in error's so-called objections to said final report does not challenge the correctness of the account, but is an application to determine the heirs, in part as follows:

"Wherefore, the said John Kenny prays that this court inquire, ascertain and determine that the said Laban Miles is not an heir and has no interest in said estate and that said John Kenny is the sole and only heir and that the whole of said estate be distributed to him and that said report be amended accordingly;" (See Exhibit "B" attached to Motion to Dismiss)

so that the only proceeding had in this cause is merely a suit for the determination of the heirs of Lah-tah-sah, deceased, upon the application of said John Kenny, upon the hearing of the final report of the former administrator, John L. Bird, who has been made a party to this appeal, and has been both served and has ac-
287 cepted. (See return of summons in error and also record in main case, page 187.)

In support of which we hereby refer to Exhibits "A" and "B" attached to defendant in error's motion to dismiss, which are respectively the final report or account of the administrator, and the objection of the said John Kenny, plaintiff in error, to the administrator's report, and also to brief and citation of authorities of plaintiff in error, which is hereto attached, marked "Exhibit A," for identification and made a part hereof.

(2.) That the said John L. Bird, administrator, was not a necessary party to said action; that the judgment in the county court of Osage county, Oklahoma, was rendered on the 14th day of March, 1914, (See C. M. pages 27 and 28) and that the judgment on appeal to the district court was rendered on the 2nd day of April, 1915, (See C. M. 101-3) and that the said John L. Bird, administrator, was not discharged as such administrator until the 20th day of May, 1915, after the rendition of both of said judgments, and was discharged without personal or legal notice to the said plaintiff in error, John Kenny, or his attorneys; and that said W. O. Dildine was appointed as such administrator without notice to plaintiff in error or his attorneys and without knowledge to them until the filing herein of the motion to dismiss; that on September —, 1915, the said John L. Bird, still represented to plaintiff in error, that is, to plaintiff in error's attorneys, that he was still administrator of said estate and signed waiver of summons in error and appearance herein; and plaintiff in error had no information that there had been any change in that respect until after the filing of the appeal in this court and the time had expired for taking further appeal, and plaintiff in error believes that such change in administrator was made for the purpose of deceiving this plaintiff in error to
288 his disadvantage.

(3.) That the said John L. Bird, and the said W. O. Dildine, had and have no interest whatever in said action and were not necessary parties to said action; that the said John L. Bird, admin-

istrator, was not present either in person or by counsel at the trial in the county court, or in the district court of Osage County, Oklahoma, referred to in paragraph #2 of this answer, that no pleadings on behalf of said administrator, other than said final report was filed in said cause; that the objections of the said John Kenny, plaintiff in error, to said report did not go to the correctness of said final account or to the correctness of any item thereof, going only to that portion of said report wherein the said John L. Bird, administrator, recommended that the said Laban Miles was a lawful heir of the said Lah-tah-sah, deceased, which is as follows:

"Your administrator, therefore petitions the court to determine and find the heirs of said estate, which he is informed and believes to be the following named persons and entitled to said estate, as follows: Laban Miles, surviving husband, one-half, John Kenny, son, one-half, and moves the court that said heirs be determined."

(See Exhibit "A" attached to defendant in error's motion to dismiss.)

Said petition in error has attached both the original case-made served on the said Laban Miles and a certified transcript of the record, judgment and proceedings in said cause.

289 (4.) Said defendant in error alleges and states that as a matter of law it was not necessary to serve notice of time and place of settling and signing case made in said action, upon the said W. O. Dildine, alleged administrator of the estate of Lah-tah-sah, deceased, nor on John L. Bird administrator of the said estate, or their attorneys, for the reason that neither the said W. O. Dildine nor the said John L. Bird had any interest whatever in said suit and were not and are not necessary parties to said suit.

That on the 28th day of February, 1914, the plaintiff in error, John Kenny, filed a demurrer to said plea of res adjudicata, (See C. M. page 20) and on the same day said matter was heard by Charles R. Gray, special judge of the county court of Osage county on said demurrer and on the same day the said Charles R. Gray, rendered judgment overruling said plaintiff in error's demurrer, (See C. M. page 21).

That thereafter on the 12th day of March, 1914, plaintiff in error filed in said cause his answer to the plea of res adjudicata filed by the defendant in error, Laban Miles, in which the said John Kenny, denied the fact that the said Laban Miles was ever married to Lah-tah-sah, the said Laban Miles claiming to be an heir by virtue of an alleged marriage to said Lah-tah-sah, and denied that said Laban Miles was an heir of the said Lah-tah-sah, and also attacking certain proceedings and alleged judgments in a previous administration in the county court and the proceedings in the district court, (C. M. pages 23-24) and also containing a general denial, that on the 14th day of March, 1914, the defendant in error, Laban Miles, filed in said cause his motion to strike all of said last above described answer excepting the general denial, (C. M. page 25) and on

290 the 14th day of March, 1914, said motion was sustained as to that part of the answer designated as paragraph #2, and

overruled as to the parts designated as #3, and A., B., and C., (C. M. Page 26).

That on the 14th day of March, 1914, the said special judge of the county court rendered a judgment finding that the said defendant, Laban Miles, was an heir of the said Lah-tah-sah, and approving said final report. (See C. M. 27-28.)

(5.) That it was not necessary for the said John L. Bird, or the said W. O. Dildine, to be present in person or by their attorneys at the time of settlement and signing the case-made for the reasons above stated; said plaintiff in error admits that the county court rendered judgment, a part of which approved the final account of John L. Bird, administrator of said estate, but alleges and states that no issue was made on the correctness of the account of the said John L. Bird, as administrator and no evidence was taken disputing the correctness of said account, but that the case was decided in the county court on a plea of res adjudicata offered by the defendant in error, Laban Miles, of a former alleged judgment rendered in the district court of Osage County, Oklahoma, on the 25th day of April, 1913, said plea of res adjudicata being shown at pages 14 to 19 inclusive of said case made, and a copy of said alleged judgment which was attached to defendant in error's plea as an exhibit is shown at pages 16 to 19 inclusive, of the case-made.

That thereafter said cause was appealed to the district court of Osage County, and after the election of A. R. Museller as
291 special judge, said cause came regularly on for trial, denovo, and on the 2nd day of April, 1914. (C. M. page 49.) The testimony and proceedings had which are shown in case-made from page 50 to 98 inclusive, show that there was no testimony whatever offered by either side with reference to the correctness of the account of John L. Bird, administrator, but that the only testimony relied upon by the said Laban Miles was the evidence offered by him of the former alleged judgment in the district court of Osage County, Oklahoma, with reference to the heirs of Lah-tah-sah, deceased. (See C. M. page 50 to 57 inclusive.)

That said John Kenny, plaintiff in error, offered no evidence as to the correctness or incorrectness or legality of the account of the said John L. Bird, administrator. (C. M. 57 to 98 inclusive.) On page 60 of the case-made it is shown that John Kenny, offered to introduce proof as to the question of heirship but that same was objected to on the ground that the alleged judgment rendered in the district court was res adjudicata and the court in sustaining the objection made the following findings:

"By the Court: Objections sustained for the reason that any testimony which goes to the question as to whether Laban Miles was the husband of Lah-tah-sah, at the time of her death has already been determined and this court cannot take judicial notice of the same." (See C. M. page 60.)

So that on this trial there was no issue whatever and no evidence whatever offered or introduced as to the correctness or sufficiency of the administrator's report, but the issues were made upon, and the testimony went solely to the matter of heirship and the court

rendered judgment finding that the plea of res adjudicata was a good plea. (See Journal Entry of Judgment, pages 100 to 103 inclusive.

292 On page 102 of said case-made, the court in its Journal Entry of Judgment, makes the following finding:

"The court further finds from the evidence that the heirs of the estate of Lah-tah-sah, deceased, have heretofore been determined by the district court of Osage County, Oklahoma, in the partition suit of Laban Miles, Plaintiff, vs. John Kenny, defendant, #1896, as per judgment of court pleaded herein by said Laban Miles, as a plea of res adjudicata and that said plea of res adjudicata should be sustained."

(6. & 7.) In answer to the 7th ground for dismissal, including paragraphs indicated by characters "*a*" to "*k*," inclusive, said plaintiff in error, John Kenny, adopts and reaffirms the matters and statements heretofore set out and stated in this response, and alleges and states that the only issue in said trial in the county court and in the district court and the only matter upon which evidence was introduced or offered was on the question of heirship; that no evidence was taken or offered questioning or attacking the correctness of the said report of the said John L. Bird, administrator, except as to his recommendation as to the identity of the *identity of the* heirs, which recommendation was not binding on the court; that said John L. Bird, former administrator, did not file in the county court of Osage County, Oklahoma, on the 31st day of December, his resignation, but merely tendered his resignation, and same

293 was not finally acted upon by the court nor the administrator discharged until May 20, 1915, after the trial in both the county court and the district court on appeal; that on the 2nd day of January, 1915, the court made an order accepting the resignation of John L. Bird, but that said administrator was not discharged and that said order did not become final nor was the administrator discharged until the 20th day of May, 1915, as shown by certified copy of record attached to said motion to dismiss; that on the 22nd day of March, 1915, said John L. Bird, administrator, of the estate of Lah-tah-sah, filed in the county court his petition, stating:

"That he desires to resign, and suggests the appointment of Dildine in his place."

(See Exhibit "B" attached to motion to dismiss.) But that said application was not passed upon until May 20th, 1915, after the trial both in the county court and in the district court and no notice whatever was given to said John Kenny, or his attorneys, of such application.

That on the 22nd day of March, 1915, a notice of application for appointment of W. O. Dildine, administrator, was issued; that said notice set the hearing of same for the 10th day of April, 1915, and there appears to have been no hearing of the matter on said date, but said matter was not passed upon by the court until May 20th, 1915, and there appears to have been no continuance or adjournment of the hearing of said matter from April 10th, 1915,

294 to May 20th, 1915, and the said plaintiff in error is informed and believes that there was no regular continuance or ad-

journment of the matter from April 10th, 1915, to May 20th, 1915; that the said John Kenny or his attorneys, had no personal notice of such application, and that the court was without jurisdiction to appoint the said W. O. Dildine, administrator; said defendant in error, John Kenny, admits that on the 20th day of May, 1915, a proposed order was made by the county court of Osage County, Oklahoma, and appointing W. O. Dildine, administrator, as shown by Exhibit "H," attached to motion to dismiss, but alleges and states that the court was without jurisdiction to make such order at that time; that said order was not made until after the judgment both in the county court and in the district court, and was without personal notice to the said John Kenny, or his attorneys.

Said defendant in error admits that on the 20th day of May, 1915, purported letters of administration were issued to said W. O. Dildine but alleges and states that same were without notice to said plaintiff in error or to his said attorneys, and that the court had no jurisdiction to make said order at that time; said plaintiff in error admits that on the 20th day of May, 1915, attempt to qualify and file in said cause a proposed bond was made, but alleges and states that said bond was without effect for the reasons above stated. That neither the said W. O. Dildine nor the said John L. Bird *was* necessary or interested parties to said action; that the said John L. Bird never appeared in any of the said proceedings in person, or by counsel and that no pleadings were filed on behalf of either of said parties and that it was not necessary to serve case-made on either said John L. Bird or the said W. O. Dildine, and neither the said John L. Bird nor the said W. O. Dildine was entitled to make
295 any suggestion or amendments to said case-made; said defendant in error alleges and states that the said John L. Bird was duly served with summons in error in this cause and that no personal notice and no legal notice were given to the said John Kenny or to his attorneys of the attempted action of the county court of Osage County, Oklahoma, on May 20th, 1915, in attempting to discharge the said John L. Bird, as administrator, and to appoint the said W. O. Dildine as administrator in his stead, and that said plaintiff in error and his said attorneys had no notice of such proceedings until after said cause had been filed in this court on appeal.

(8) Plaintiff in error alleges that this is not an action adverse to the estate of Lah-tah-sah, deceased, nor adverse to her administration, but is a controversy solely between this plaintiff in error and said Laban Miles, upon their claim of heirship of this estate; that the reversal of the judgment herein would not affect the estate of descent in any respect whatever, nor affect the administrator, nor affect the interests of the said John L. Bird, nor the interests of the said W. O. Dildine; that the said W. O. Dildine was not a party *of* the judgment of the district court of Osage County, which was appealed from and he cannot be made a party to such action; that all of the parties in the action in the district court of Osage County appealed from herein, have been made parties herein and duly brought into this appeal; that the said Lah-tah-sah, deceased, was a restricted Osage Indian

Allottee; and the said John Kenny and the said Laban Miles are restricted Osage Indians whose restrictions have not been removed by the Honorable Secretary of the Interior; that the estate of Lah-tah-sah, deceased, in the hands of the administrator consists solely of a small amount of money and nothing more; that there are no
296 debts against said administrator or estate; that there are no creditors of said estate and that the residue of said estate consists of restricted Osage Indian Allotments made to the said Lah-tah-sah, deceased, and of moneys due her from the United States which is held by the United States and the Superintendent of the Indian Agency, all of which allotments and moneys held by the United States and by the Superintendent of the Osage Indian Agency is restricted and under the control of the Honorable Secretary of the Interior; and that the only matter in issue in this appeal is to determine between this plaintiff in error and the said Laban Miles, whether or no the said Laban Miles is an heir of the said Lah-tah-sah, deceased; and a judgment in that respect would not affect the interests of said estate nor the interests of the administrator thereof, either in his official or personal capacity, or the interests of either the said W. O. Dildine or John L. Bird.

Wherefore, plaintiff in error, John Kenny, prays that said motion to dismiss this appeal be overruled and dismissed.

PAUL VAN WINKLE,
E. R. HASTINGS,
Attorneys for John Kenny, Plaintiff in Error.

STATE OF OKLAHOMA,
Oklahoma County, ss:

E. R. Hastings, being first duly sworn, deposes and says that he is one of the duly employed and authorized attorneys for John Kenny, the above named plaintiff in error; that the said John Kenny is not within Oklahoma County, State of Oklahoma, at this time and that affiant makes affidavit as his attorney by reason of his absence and for the further reason that most of the matters set out and
297 stated in the within and foregoing response are within the personal knowledge of this affiant; that affiant knows the contents of the within and foregoing response and answer and that the matters and statements therein contained are true.

E. R. HASTINGS.

Subscribed and sworn to before me by the said E. R. Hastings, this 18th day of January, 1916.

LORENE MORRIS,
Notary Public.

My Commission expires January 19th, 1919.

298–311 STATE OF OKLAHOMA,
County of Oklahoma, ss:

In the Supreme Court of the State of Oklahoma.

No. 7708.

JOHN KENNY, Plaintiff in Error,

vs.

LABAN MILES, and JOHN L. BIRD, Administrator of the Estate of Lah-tah-sah; Osage Allottee, #256, Deceased, Defendants in Error.

E. R. Hastings, being first duly sworn deposes and says that he is one of the duly authorized and employed attorneys for the plaintiff in error, John Kenny; that on the 18th day of January, 1916, he duly served a copy of the within answer and brief upon H. P. White, attorney for defendant in error, Laban Miles, by placing said copy in an envelope, properly addressed to the said H. P. White at Pawhuska, Oklahoma, that being the regular and usual place of residence of the said H. P. White, and by placing sufficient postage on said envelope to carry same to its destination and depositing same in the United States mails.

E. R. HASTINGS.

Subscribed and sworn to before me by the said E. R. Hastings, this 15th day of January, A. D. 1916.

[SEAL.] LORENE MORRIS,
Notary Public.

My Commission expires January 19, 1919.

312 & 313 Endorsed: No. 7708. In the Supreme Court of the State of Oklahoma. John Kenny, Plaintiff in Error v. Laban Miles et al., Defendants in Error. Response and Brief Resisting Motion to Dismiss Appeal. Filed Jan. 18, 1916. William M. Franklin, Clerk. P. H. Van Winkle, E. R. Hastings, Att'ys for Plaintiff in Error.

314 In the Supreme Court of the State of Oklahoma.

No. 7708.

JOHN KENNY, Plaintiff in Error,

v.

LABAN MILES et al., Defendants in Error.

Answer of the Defendant in Error, Laban Miles, to the Petition for Rehearing of Plaintiff in Error.

Comes now defendant in error, Laban Miles, and for answer to petition for re-hearing, alleges and states:

First. That inasmuch as the plaintiff in error made his petition for re-hearing in the nature of a petition for re-hearing and brief in support of same, we beg leave to file answer in the same form, and

Second. That plaintiff in error has wholly failed to set forth any reason or ground for a re-hearing as provided by Rule 9 of this Honorable court in that:

(*a*) Plaintiff in error has wholly failed to show that some question, decisive of the case, duly submitted by the counsel has been overlooked by the court.

(*b*) Plaintiff in error has wholly failed to show that the decision is in conflict with an express statute or controlling decision to which the attention of the court was not called, either in brief or oral argument, or which has been overlooked by the Court.

(*c*) Plaintiff in error has wholly failed to set forth any controlling question, statute, or decision overlooked by the Court.

315 Third. That the plaintiff in error has wholly failed to set forth any question decisive of the case, that was not fully considered and passed upon by the Court.

Fourth. Plaintiff in error has wholly failed to show that the decision complained of is in conflict with any express statute or controlling decision to which the attention of the Court was not called, but instead, has reiterated statutes and decisions which were expressly called to the attention of the court both in brief and oral argument and fully considered and passed upon by the Court in rendering decision complained of.

Fifth. Plaintiff in error has wholly failed to set forth or show any question, statute, or decision not fully considered and passed upon by the court in rendering the decision complained of.

For the foregoing reasons, the petition for re-hearing should be overruled and denied.

In support of the foregoing, we beg leave to submit the following:

Counsel for plaintiff in error admitted during the course of oral argument before this Honorable court that the record shows the allotment of lands in question to have been made subsequent to the death of Lah-tah-sah, and insisted in oral argument and in brief and in reply brief that the fact that the said Lah-tah-sah died before

receiving the allotment made no difference, as there were but two classes of allotments, to-wit, homesteads, and surplus, and that restrictions against alienation were imposed upon both classes, whether the allotment was made to or on behalf of a member of the tribe after the death of such member, or during his or her life-time. However, counsel for plaintiff in error now seemed to desire to change their theory of the case, and insist that the allotments were
316 made to Lah-tah-sah in her life-time, and we assume, in an effort to detract attention from their change of theory, state that the defendant in error changed his theory of the case on appeal from that presented in the trial court, but the record does not bear out this statement, and defendant in error has not changed his theory, and does not desire to do so.

The case arose in the county court of Osage County on the final account of the administrator, wherein he alleged that the heirs of Lah-tah-sah were Laban Miles, the defendant in error, and John Kenny, the plaintiff in error, each being the heir to an undivided one-half interest in the estate (Record p. 12). On February 28th, 1914, the plaintiff in error, John Kenny, filed his exceptions to the final account of the administrator, and alleged that he was the sole and only heir at law of said Lah-tah-sah, and that Laban Miles was not an heir, and had no interest in the estate and prayed that the Court ascertain and determine that said Laban Miles was not an heir, and had no interest in said estate, and that said John Kenny was the sole and only heir, and entitled to the whole of the estate (Record p. 13). The plaintiff in error thus attempted to have the question of heir-ship adjudicated by the county court. The defendant in error insisted that this question had once been litigated between the parties, and could not again be litigated, and thereupon the defendant in error filed in the county court his plea of res adjudicata, alleging that the question of heirship had been decided by the District Court of Osage county, Oklahoma, and pleaded the judgment of the District court as a plea of res adjudicata, and as final and conclusive as to both parties on the question of the heirs of said Lah-tah-sah, deceased, and the portion of the estate inherited by each (Record pp. 14-19). To this petition plaintiff in error filed a demurrer (Record p. 20), which demurrer was by the court overruled (Record p. 21). Thereafter on the 12th day of March, 1914, the plaintiff in error, John Kenny, filed an answer in the county court to the plea of res adjudicata of the de-
317 fendant in error, and for answer alleged:

First, a general denial.

Second, alleged that the defendant in error, Laban Miles was never married to his mother, Lah-tah-sah, deceased, or became her husband, or heir, and,

Third, alleged that the District Court of Osage County, Oklahoma, was without jurisdiction to render any judgment in the partition suit for the reason that the lands therein described were restricted lands (Record p. 23).

Thus, the plaintiff in error, sought, First, to re-litigate the question of the marriage of his mother and the defendant in error, Laban

Miles, and Second, sought to establish that the lands involved in the partition suit were restricted Osage Indian lands, which raised the very question in the county court, that his Honorable Court has passed upon, and decided in the decision complained of.

On appeal from the county court to the district court of Osage county, the same questions were presented and passed upon by the district court adverse to the contentions of the plaintiff in error.

On appeal to the Supreme Court, this Honorable Court again passed on this question adverse to the contentions of the plaintiff in error.

Counsel for plaintiff in error state in substance that, inasmuch as Lah-tah-sah, deceased, was given an allotment number, to-wit, #256, that this court should consider that fact as evidence that the allotment was made to her in her life-time. In reply to this, we state that the court will recall that section one of the Osage Division Act quoted by plaintiff in error in his petition for re-hearing fixes the roll of membership of the Osage tribe of Indians as it existed on the first day of January, 1906, providing that added thereto should be the names of all children born between January 1st, 1906 and July 1st, 1907, to members whose names were on the roll on January
1st, 1906. This fixed the legal membership, as shown by
318 said roll as of January 1st, 1906, including children born as
stated, and all persons whose names were included on the legal roll, were entitled to share in the division of the lands and funds of the Osages, in case they were living when the division was made, and, in case any such member died subsequent to January 1st, 1906, and before receiving his allotment, his right to the allotment and to the moneys of the tribe descended to his heirs under section six of said Act. The court will also recall the fact that the Osage Division Act was not passed and approved until June 28th, 1906, or six months after the date on which the roll was fixed, and that members of the tribe whose names were on said roll on January 1st, 1906, but who dies subsequent to that date, and before the passage of the Act June 28th, 1906, were entitled to share in the division of the lands and funds of the Osages, a and this right descended to their heirs, and, as a matter of fact, a number of the Osages died during this six months' period. The record now on file in the Supreme Court of the State in #2626, The Levindale Lead and Zinc Mining Company vs. Charles Coleman, the decision in which was reversed by the United States Supreme Court, states pp. 71-2, shows that Joseph Coleman died on the 27th day of February, 1906. This was four months before the passage of the Osage Division Act, yet Joseph Coleman was given an allotment number, to-wit, #2098.

Same record and pages show that Mary Coleman, the mother of Joseph Coleman, died February 28th, 1906, four months before the passage and approval of said division act, yet she was given an allotment number, to-wit, #580. In the case #7742, Fowler vs. Rogers et al., now pending on appeal in the State Supreme Court, shows that Ella Rogers was a member of the Osage tribe of Indians whose

name appeared on the roll January 1st, 1906, and that she
319 died on March 15th, 1906, more than three months before the Osage Division Act was passed and approved. Yet she was given an allotment number, to-wit #1804. The fact that the three Osages just mentioned were given allotment numbers is not evidence that they received allotments in their life-time, and counsel for plaintiff in error would hardly contend that a member of the Osage tribe of Indians could have received an allotment under the provisions of the Osage Allotment or Division Act three or four months before the passage and approval of said Act.

Section 12 of the Osage Division Act reads as follows:

"That all things necessary to carry into effect the provisions of this Act not otherwise herein specifically provided for shall be done under the authority and direction of the Secretary of the Interior."

By virtue of Section 12 just quoted, the Secretary of the Interior was given authority to do all things necessary to carry into effect the provisions of the act not specifically provided for by the act, and the facts are that, as an aid to carrying into effect the provisions of the act, the roll was made up as provided by Section One of the act, which includes the names of all persons whose names were on the annuity payment roll January 1st, 1906, and the names of all children born to such members between January 1st, 1906, and July 1st, 1907, and a number was set opposite the name of each person placed upon said roll. This roll was approved by the Secretary of the Interior, and constitutes the approved roll of the membership of the Osage tribe of Indians. When this roll was made up and this number given, it included the names of all persons entitled to share in the division of the lands and funds of the Osages, whether living or dead at the time the said roll was made up.

320 Counsel for plaintiff in error argue that as the Osage Division Act provided for the settlement of the roll of the members of the tribe as of January 1st, 1906, that as to the members of the tribe whose names were on the roll January 1st, 1906, their share of the tribal properties become fixed as of January 1st, 1906. This is equivalent to saying that the provisions of the Division Act making provisions for the division of the tribal lands and funds were in the nature of a grant in præsenti and vested title in the individual of his or her pro rata share in acres of the lands as of January 1st, 1906. This contention, however, is refuted by the United States Supreme Court in Sizemore v. Brady, 235 U. S. 441, 59 L. ed. 308, wherein it is said:

"On the part of the maternal cousins it is contended that the provisions in the original agreement relating to the allotment and distribution of the tribal lands and funds were in the nature of a grant in præsenti, and invested every living member of the tribe and their heirs, designated in the tribal law, of every member who had died after April 1, 1899, with an absolute right to an allotment of lands and a distributive share of the funds, and that Congress could not recall or impair this right without violating the due process of law clause of the 5th amendment to the Constitution. To this we can-

not assent. There was nothing in the agreement indicative of a purpose to make a grant in præsenti. *On the contrary, it contemplated that various preliminary acts were to precede any investure of individual rights. The lands and funds to which it related were tribal property, and only as it was carried into effect were individual claims to be fastened upon them.* (Italics ours.)

Also, in the case of Woodward vs. De Graffenried, 238 U. S., 284, 59 L. Ed. 1310—reading on 1327, the Supreme Court of the United States said:

"In our opinion the equitable title to the Agnes Hawes allotment was vested in her heirs according to Creek law by the clear meaning of paragraph 28, which says: 'All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled—shall be placed upon the rolls—and if any citizen had died since that time—before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled if living shall descend,' etc.

321 *'Although she had been placed in possession of an allotment, she had not in her lifetime 'received' it, in the sense of the Agreement, for this contemplated ownership in fee, and she had received* only a provisional surface right. *Besides, while in paragraph 6 in confirming the allotment brought it under those provisions of the Agreement that contemplated a patent in fee,* it was still only a partial dividend out of the property of the tribe."

In this opinion the court further said:

"It is perhaps unnecessary to say that the subsequent issue of a patent to the 'Heirs of Agnes Hawes,' without naming them, conveyed the legal title to those persons upon whom the equitable title was conferred by the Original Agreement.

"The restrictions upon alienation contained in the Original Agreement did not apply to allotments made on behalf of deceased members of the tribe. Skelton v. Dill, 235 U. S., 206, 210 ante, 198, 200, 35 Sup. Ct. Rep. 60."

Also the Circuit Court of Appeals, Eighth Circuit, in the case of Welty vs. Reed, 231 Fed. 930, said:

"The one and only question involved in the present case is whether the heirs of Thomas Knight had power to alienate the allotment originally made in the name of their father (who died prior to the taking effect of the original Creek allotment) but which was subsequently confirmed by patent in them prior to August 8, 1907, which is the date of the expiration of the five-year period of restriction imposed by the Original and Supplemental Creek Agreements. In other words, do the restrictions of those agreements apply in a case where an allotment was made in the name of a father, who died prior to the Original Creek Agreement and before a patent was issued to him, whose heirs afterwards received the patent directly therefor?

"This case was heard by this court at its December term, 1914, and a decision was reached reversing the judgment of the district court and sustaining the contention of the defendant Welty. Welvy v. Reed, 219 Fed. 864, 135 C. C. A. 534. Afterwards, the attention of the court being called to the decision of the Supreme Court in the case of Woodward v. De Graffenried, 238 U. S., 284, 35 Sup. Ct. 764, 59 L. Ed. 1310, which had not appeared prior to the decision or the present case by this court, we sustained a motion for a rehearing. The Woodward Case has now been carefully and critically considered, and in our opinion it presents a case altogether similar in its facts to the case now before us. In it the points now relied upon by opposing counsel in support of their respective contentions in this case where given exhaustive consideration by the Supreme Court, and that court held with the contention of the appellee that *an allotment made to a Creek Indian in his life-time, who afterwards received a patent for the land, took only a provisional surface right, and that such allottee had not been placed in possession of an allotment, or had not 'received an allotment'* as contem-
322 plated by section 7 of the Original Creek Agreement, or section 16 of the Supplemental Creek Agreement, *and that as a result the final allotment and patent made to the heirs of such allottee did not subject them to any of the restrictions against conveyances of their land found in these sections.*" (Italics ours.)

We agree with the statement of counsel for plaintiff in error in their reply brief, page 11, where they say:

"Partition is a form of alienation, in the course of which the interests of each is excluded from the whole and made exclusive in a part, or the whole is sold, divesting the Indian title altogether."

The Osage Division Act provided a plan, method, or scheme, the main object of which was to divide or "partition" the lands and funds of the Osage, whereby the title of the United States and the Osage tribe of Indians was to be "excluded from the whole" and title of each individual members of the tribe, or his heirs, made "exclusive in a part." This was accomplished by the execution of deeds by the principal chief for the Osage, approved by the Secretary of the Interior as per Section 8 of the Osage Division Act which provides:

Section 8. "All deeds to said Osage lands or any part thereof shall be executed by the principal chief for the Osages, but no such deeds shall be valid until approved by the Secretary of the Interior."

As was said in Sizemore v. Brady, supra, the Osage Division Act contemplated that various preliminary acts were to precede any investure of individual rights. The land and funds to which it related were tribal property, and only as it was carried into effect were individual claims to be fastened upon them.

The fourth paragraph of Section 2 provides inter alia with respect to homestead that the "certificate of allotment and deed shall desig-

nate the same as a homestated." But no "certificates of allotments" were ever made or issued.

The sixth paragraph of Section 2 provides inter alia that
323 "The schedules of said selections and divisions of lands herein provided for shall be subject to the approval of the Secretary of the Interior."

If certificates of allotment had, in fact, been issued, and if a member could be said to have received an allotment upon receipt of such certificate, yet plaintiff in error would not be benefited thereby, because such allotment certificate could not have been issued before the approval of the schedule of selections (of members) and divisions (of remaining lands by the Commission) by the Secretary of the Interior. The schedule of the first, second and third selections was not approved by the Secretary of the Interior until November 19, 1908, three months after the death of Lah-tah-sah, and the schedule of "Final Division" was not approved by the Secretary until August 2, 1909, nearly one year after the death of Lah-tah-sah, who died August 19, 1908.

Only two schedules were made out—one schedule embracing the first, second and third selections, and the second schedule embracing the final division of the remaining lands made by the allotting commission.

We here quote from an official letter showing the date of the approval of these schedules:

(Copy.)

"DEPARTMENT OF THE INTERIOR,
WASHINGTON, June 9, 1913.

MY DEAR MR. DAVENPORT:

I have the honor to acknowledge the receipt of your letter of June 2, inclosing a communication from Mr. George B. Denison, of Vinita, Oklahoma, requesting to be advised when—the schedule of allotments containing the name of Cena June, allottee No. 581, was approved by the Secretary of the Interior.

In reply you are advised that the files of the Indian Office show that—the schedule of the first, second and third selections containing the name of Cena June, allottee No. 581, was approved by the Assistant Secretary on November 19, 1908; and the schedule of "Final Division" of lands to the Osage Indians was approved by the Acting Secretary of the Interior on August 2, 1909.

Mr. Dennison's letter is returned herewith.

Very truly yours,
(Signed) LEWIS C. LAYLIN,
Assistant Secretary.

Hon. James S. Davenport, House of Representatives."

324 A joint resolution of February 27th, 1909 (35 Stat. L. 1167) provides that homesteads of members of the Osage tribe

may consist of land designated of any one or more of the first three allotment selections. This conclusively shows that up to February 27, 1909, the matter of selecting and designating homesteads was yet an open question, and that after February 27th, 1909, the homestead might be designated from any one or more of the first three selections. This was six months after the death of Lah-tah-sah.

The seventh paragraph of section 2 provides for the issuance by the Secretary of the Interior of certificates of competency to members "authorizing him to sell and convey any of the lands deeded him by reason of this Act, except his homestead.

This paragraph further provides:

"That upon the issuance of such certificate of competency the lands of such member, except his or her homestead, shall become subject to taxation, and such member, except as herein provided, shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States."

It follows from the foregoing that a member of the tribe to whom a certificate of competency is issued, is authorized to convey only lands that were deeded him by reason of said act; that upon the issuance of said certificate of competency, the lands of such member (lands deeded to such member) shall become subject to taxation, and the member shall have the right to manage, control and dispose of his or her lands (the lands deeded to him or her) the same as any citizen of the United States. The lands, however, did not become the lands of such member, and such member was not authorized to convey same until after such lands were "deeded him by reason of this act." In other words, "the interest of each" was not "excluded from the whole and made exclusive in a part" until the deeds provided for by said act were executed by the principal chief and approved by the Secretary of the Interior. In the instant case, the first deed on behalf of Lah-tah-sah, deceased, was dated and executed
325 by the principal chief on September 23, 1908, more than thirty days after the death of Lah-tah-sah, and was not approved by the Secretary of the Interior and did not become effective until February 20, 1909, (Record p. 97). The second deed executed on behalf on Lah-tah-sah was dated and executed by the principal chief on the fifth day of May, 1909, (Record p. 95). These deeds were introduced in evidence in the court below by the plaintiff in error. In the language of the Supreme Court of the United States in Sizemore vs. Brady, supra, "The lands and funds to which it (the Act of Congress) related were tribal property, and only as it was carried into effect were individual claims to be fastened upon them" Although Lah-tah-sah, deceased, may have been living during a portion of the time that the preliminary acts looking toward the investure of title in the individual were being taken, yet, in the language of the United States Supreme Court in Woodward vs. De Graffenried, supra, "she had not in her life-time received it, for this contemplated ownership in fee." The fee did not pass from the United States and the Osage tribe of Indians to the individual members of the tribe

entitled thereto, or their heirs, until the deeds provided for where executed and approved. Upon the death of said Lah-tah-sah on the 19th day of August, 1908, she had received no deed, and no title had vested in her to any specific portion of the lands belonging to the Osage. Upon her death, her right to acquire title to the lands in question descended to her heirs, and on the subsequent execution and approval of the deeds in question, the title thereto vested in her heirs.

No trust period was provided for by the Osage Division Act during which the United States was to hold the lands of the Osage in trust for the individual members of the tribe, at the expiration fee patents were to issue, but on completion of all preliminary acts title to his or her fair share thereof in acres was to be vested in each member of the tribe, as shown by the approval roll, of his or her heirs,
326 to be conveyed by deed, as provided in said act. Each deed executed by the principal chief, and approved by the Secretary of the Interior, as provided by said act, contained, among other things, the following:

"Now therefore, I, the undersigned Principal Chief of the Osage tribe of Indians, by virtue of the power and authority vested in me by the said act of Congress have granted and conveyed, and by these presents do grant and convey, unto the said —, all right, title, and interest of the United States and the Osage Tribe of Indians in and to the following described lands situated on the Osage Reservation in Oklahoma, to-wit: * * * to have and to hold the same unto the said —, his heirs, executors, administrators and assigns, forever."

When such deed or deeds were executed by the principal chief, and approved by the Secretary of the Interior, on behalf of a mmber of the Osage tribe of Indians during his or her life-time, such member thereupon became an allotted Osage Indian and not before.

The contention of counsel for plaintiff in error that if the lands in question were unrestricted the county court acquired no jurisdiction in the proceedings for the appointment of an administrator is too frivulous to merit mention. It is sufficient to say that the lands in question, being unrestricted, came under the jurisdiction of the county court for distribution to the heirs the same as any lands in the state of any county of the state may come under the probate jurisdiction of the county court of that county. But if the lands in question were in fact restricted lands (which we do not admit) they would come under the jurisdiction of the probate court of Osage county by virtue of Sec. 3 of the Act of Congress approved April 18, 1912.

The Petition for the appointment of an administrator (Rec. p. 3) in addition to the lands alleged that the estate consisted in part of trust funds (which amounted to nearly $4,000) and oil and gas royalties of about $600.00 per year. This petition was filed July 8, 1912 (Rec. reverse side of p. 3) at which time Lah-tah-sah had been dead nearly four years, and about $2,400.00, in oil and gas
327 royalties had accumulated so that the personal property amounted to about $8,000.00, and therefore, so far as con-

ferring jurisdiction on the court to administer the estate, it was not necessary to mention the lands at all in the petition. The fact that Grinstead, Mason & Scott, att'ys for the administrator and the petitioner for the appointment of him, stated in the petition that he estate consisted in part of "Land allotted to her as a member of the Osage Tribe of Indians" is immaterial. It is not an allegation even that such allotment was made to her while living, or during her lifetime in her own right. The petition was filed three years after the execution and approval of the deeds in 1909, and four years after the death of Lah-tah-sah and the substance of the allegation in the petition for the appointment of an administrator that the allotment deeds were made out to Lah-tah-sah as if she was living, but that in fact she was dead at the time, alleging "that Lah-tah-sah departed this life at Pawhuska in the County of Osage and State of Oklahoma, on or about the 19 day of August, A. D. 1908", and that the lands on July 8th had passed to the heirs and constituted a part of the estate to be administered.

Counsel for plaintiff in error quote in full, on page 2 of their petition for rehearing, paragraph 1 of the petition for "partition" wherein it is stated:

"That by a deed dated September 28, 1908, recorded Mar. 2, 1909, in Book 1 of Homestead Deeds, page 247, in the office of the Register of Deeds for Osage County, Oklahoma, there was conveyed to Lah-tah-sah the following tract of land in Osage County, to wit"; (Describing the land) and

That by a deed dated May 15, 1909, recorded August 10, 1909, in Book 1 of Allotment Deeds, page 282, in the office of the Register of deeds for Osage County, Oklahoma, there was conveyed to Lah-tah-sah the following tracts of land in Osage County, to wit" (Describing the lands.

328 But they carefully refrained from quoting the first three lines of paragraph 2 of the same petition which read:

"That on or about the 19th day of August, 1908, Said Lah-tah-sah died intestate, leaving surviving her Laban Miles, husband, plaintiff, and John Kenny, an only child, the defendant. There is no allegation in the petition that Lah-tah-sah died seised of the lands in question, but the allegation is, bearing in mind the dates pleaded, that the lands in question were "by a deed dated September 28, 1908, recorded Mar. 2, 1909" and "by a deed dated May 15, 1909, recorded August 10, 1909, there was conveyed to Lah-tah-sah" the lands in question; that said Lah-tah-sah died on or about the 19th day of August 1908, or before the conveyances were made, dated, approved or filed for record; that plaintiff and defendant were the owners thereof and prayed for partition of same.

In conclusion we insist that the decision rendered in this case is correct, that the lands in question were not distributed to and that no title thereto had vested in Lah-tah-sah, the deceased member, during her lifetime, but that same passed to her heirs under the provisions of the Osage Division Act approved June 28, 1906, Sec. 6 of which put the laws of descent of Oklahoma into effect respecting

said "lands moneys and mineral interests;" that there was no distinction made as to heirs and they may be white or Indian, members of the tribe or nonmembers; that the Supreme Court of the United States in The Levindale Lead and Zinc Mining Co. vs. Coleman supra held that no restrictions are imposed on lands inherited by a white person, an heir of a deceased member of the Osage tribe of Indians, where the member of the tribe died before title to the lands passed to such member, but descended to the heirs; that
329 there being no distinction made as to heirs the same rule must apply where the heirs are Indians and also members of the tribe as shown by the official approved roll; that the Supreme Court of the United States in the Coleman case supra said:

"Deeds to the Osage Lands were to be executed by the Principal Chief, but were not to be valid until approved by the Secretary of the Interior (Sec. 8), and it was further provided that whatever was necessary to carry into effect the provisions of the Act should be done under the authority of this officer (Sec. 12).

The form of the "Deeds to the Osage lands" "To be executed by the Principal Chief" was not prescribed by the Act, but this was done by the Secretary of the Interior "to carry into effect the provisions of the Act" and by the deeds the interests of the individual were "excluded from the whole and made exclusive in a part" and the individual member, or his or her heirs, became invested with title to "his or her fair share thereof in acres." If any member died before the lands were thus deeded same passed to his or her heirs free from restrictions upon alienation.

Respectfully submitted.

H. P. WHITE,
Att'y for Def't in Error, Laban Miles.

330 No. 7708. John Kenny, Pl'ff in Error, vs. Laban Miles et al., Defendant in Error. Answer to Petition for Rehearing. Filed in Supreme Court of Oklahoma, Jan. 27, 1917. William M. Franklin, Clerk. H. P. White, Pawhuska, Okla., Att'y for Def't in Error, Laban Miles.

331 In the Supreme Court of the State of Oklahoma.

Filed in Supreme Court of Oklahoma, Feb. 14, 1917. William M. Franklin, Clerk.

No. 7708.

JOHN KENNY, Plaintiff in Error,

v.

LEBANAN MILES, and JOHN L. BIRD, Administrator of the Estate of Lah-tah-sah, Osage Allottee, No. 256, Deceased, Defendant in Error.

Motion.

Application of Plaintiff in Error for Leave to File a Second Petition for Rehearing.

Comes now the plaintiff in error and for his application for leave to file a second petition for a rehearing herein, alleges:

That on, to wit, January 2nd, 1917, the Honorable Supreme Court Commission and this Honorable Court affirmed the judgment below.

That within due time this plaintiff in error filed his petition for a rehearing which was denied January 30th, 1917.

That plaintiff in error does not believe that said case and petition for rehearing received due consideration, and that there are fundamental as well as other errors in the record and judgment affirmed.

That said action was one in administration of the estate of one Lah-tah-sah, deceased, Osage Indian Allottee No. 256, involving lands allotted to her as such Indian in Osage County.

332 That the county court, and the district court of Osage county on appeal from the county court, held that defendant in error was an heir and distributed to him one half of such lands.

That the case was tried below on the theory that they were the lands belonging to the estate of deceased; but if such, they were restricted lands and plaintiff in error would not be bound by a former judgment in partition adjudging one half of these lands to Laban Miles, which was pleaded by Laban Miles in this administration proceedings, and held by the court below to be res adjudicata of the same issues in the administration proceedings, which error would entitle plaintiff in error to a reversal of said judgment.

But the Honorable Commission without evidence found, and the judgment below was affirmed upon the theory, that the lands were not allotted to the deceased in her life time and therefore not the lands of a deceased Osage Allottee, and not restricted, and for that reason the plea of res adjudicata was good.

That such findings and affirmance of such judgment is contradictory and contains the fundamental error of affirming a judgment below distributing lands jurisdiction over which was acquired be-

cause they were the lands of the deceased, upon the theory that they were not restricted because they were not allotted to the deceased, and therefore not her lands.

For these and the other reasons set out in the proposed petition for rehearing hereto attached, plaintiff in error prays this Honorable Court for leave to file such attached petition for rehearing as his second petition for rehearing herein.

JOHN EMBRY,
EMBRY, CROCKETT & JOHNSON,
Attorneys for Plaintiff in Error.

333 In the Supreme Court of the State of Oklahoma.

No. 7708.

JOHN KENNY, Plaintiff in Error,

v.

LABAN MILES, and JOHN L. BIRD, Administrator of the Estate of Lah-tah-sah, Osage Allottee, No. 256, Deceased, Defendants in Error.

Petition for Rehearing.

Comes now the plaintiff in error and files this, his second petition for re-hearing herein, and asks the Court to consider the same, not only for the formal reasons hereinafter given, but for the obvious and fundamental error in affirming the judgment in this case by the Honorable Supreme Court Commission, and by this Court, for the reason that the proceeding herein is a proceeding of administration on the estate of Lah-tah-sah, Osage Allottee No. 256, deceased, who was a full-blood Osage Indian woman, and the judgment of the lower court so affirmed by the judgment of the Honorable Supreme Court Commission was a judgment distributing certain lands of the said Lah-tah-sah, as a part of her estate, and the judgment was affirmed on the theory that such lands did not belong to her estate and therefore were not subject to restriction. It presents the fundamental error and contradiction of affirming the judgment distributing lands belonging to Lah-tah-sah on the theory that such lands did not belong to Lah-tah-sah; and we submit that in justice to plaintiff in error such a contradictory and obviously fundamental error should not be permitted to stand.

334 Second. For further grounds for re-hearing, plaintiff in error alleges and shows that the following questions of both fact and law decisive of the case were duly submitted by counsel for plaintiff in error and were overlooked by the Court; and the decision affirming the judgment below is in conflict with the express statutes and controlling decisions which have been overlooked by the Court:

(*a*) The following questions of fact decisive of the case was duly submitted by counsel to the court and was overlooked by the Court:

"This is a contest of the heirs to the estate of a deceased Osage Indian allottee. Lah-tah-sah, the deceased, was a full-blood Osage Indian woman, who died in Osage County, where she had been allotted lands, without receiving a certificate of competency, or having her restrictions removed. Plaintiff in error, her son, who is also a non-competent Osage Indian, survived her and is her only heir-at-law, unless the defendant in error, Laban Miles, who is also a non-competent Osage, was the husband of the deceased, which is disputed; and this is an appeal from the district court of Osage county, adjudging Laban Miles an heir.

"The defendant in error, John L. Bird, was appointed and acted as administrator of the estate of the deceased. His account has been approved and he has no interest in the real issues involved. In the course of the administration of the estate in the county court of Osage County, the final report of the administrator was filed, praying distribution of the residue of the estate, consisting of the allotments of the deceased, and about $200 derived from rentals thereof, and alleging his information that said John Kenny and said Laban Miles were the heirs of decedent and entitled to inherit equally. Whereupon, the plaintiff in error filed his motion (record 13), alleging that he was sole heir and excepting to the suggestion that Laban Miles was an heir, and asking a hearing thereon. To this, the defendant in error, Laban Miles, filed by way of response, a plea of res adjudicata (Record 14), alleging, in substance, that on April 25, 1913, the District Court of Osage County, special Judge Boone presiding, in a partition action therein in which the same Laban Miles was plaintiff and the same John Kenny was defendant, rendered a judgment adjudging that the said Laban Miles was married to and was the husband of the deceased at the time of her death, and decreeing partition of such allotments, one-half to Laban Miles and one-half to John Kenny, and that such judgment has not been appealed from, but has become final, and was res adjudicata of the issues in the County Court, to which plea plaintiff in error filed a demurrer." See plaintiff in error's brief, pages 1-3.

335 Then, on pages 16 and 17 of said brief, plaintiff in error sets out the petition of Laban Miles on which said judgment of partition was rendered, in which it was recited in effect that the said John Kenny and Laban Miles were the sole heirs of Lah-tah-sah, Osage Indian Allottee No. 256, deceased; that by deed Dated September 28, 1908, recorded March 2, 1909, in Book 1 of Homestead Deeds, page 247, in the office of the Register of Deeds for Osage County, Oklahoma, there was conveyed to Lah-tah-sah, the following tract of land, in Osage County, Oklahoma; and then describing the land. And that by a deed dated May 15, 1909, recorded August 10, 1909, in Book 1 of Allotment Deeds, page 282, in the office of the Register of Deeds of Osage County, Oklahoma, there was conveyed to Lah-tah-sah, the following tracts of land in Osage County, Oklahoma; and then describing the lands. And that on or about the 19th day of August, 1908, the said Lah-tah-sah died intestate, leaving surviving her, Laban Miles, husband, and John Kenny, only child; that the said Laban Miles and John Kenny were the only

heirs-at-law of said Lah-tah-sah, deceased, and on her death sai
estate vested one-half in Laban Miles, the plaintiff in that actio
and one-half in John Kenny, the defendant in that action.

Then, on pages 19-23 of said brief, plaintiff in error sets out
copy of the journal entry rendered by the District Court of Osag
county in said partition proceeding, which was attached to the pl
of res adjudicata of the said Laban Miles; and in which partitio
judgment the court found, among other things, that the said Lal
tah-sah, Osage Indian Allottee No. 256, died intestate on or abo
the 19th day of August, 1908, leaving an estate consisting in pa
of the lands described in plaintiff's petition; and, furthe
336 that the plaintiff, Laban Miles and defendant, John Kenne
above named, are the only heirs-at-law of said Lah-tah-sa
deceased, and, as such plaintiff Laban Miles owned an undivide
one-half interest in and to the lands allotted and deeded to sai
Lah-tah-sah, described in plaintiff's petition; that is, this plea of r
adjudicata filed by defendant in error in the administrative pr
ceeding upon the estate of Lah-tah-sah, deceased, set up a form
judgment in partition secured by the same Laban Miles in th
District court of Osage county, on the 24th day of April, 1913, i
which the said Laban Miles' petition had treated these lands as th
lands of Lah-tah-sah and the court had judicially decided that Lal
tah-sah died intestate, leaving an estate consisting in part of thes
lands and that the said Laban Miles and John Kenny took eac
an undivided one-half of such lands as heirs of the said deceased

These questions were overlooked by the Honorable Supreme Cou
Commission, and they are decisive of this case, for the reason tha
the judgment in this case affirms a later judgment of the Distri
court rendered on appeal from the county court of Osage count
administering this estate, in which these same lands are distributed
as the estate of the deceased; and if these lands are part of the esta
of the deceased, then it necessarily follows that they were her allo
ment at the time of her death; and if they were her allotment
the time of her death, they are restricted lands of a deceased Osag
Indian allottee, coming under the provisions of the Act of Congre
of April 18, 1912, Section 6 of which provides:

"That from and after the approval of this Act, the lands of d
ceased Osage allottees, unless the heirs agree to partition the sam
may be partitioned or sold upon proper order of any court of com
petent jurisdiction, in accordance with the laws of the State of Okl
homa; provided, that no partition or sale of the restricted lands
the deceased Osage allottee shall be valid until approved by th
Secretary of the Interior."

337 Now, this judgment of partition, which was pleaded
res adjudicata in the administrative proceeding, was not a
proved by the Honorable Secretary of the Interior; and if the
lands are the restricted lands of a deceased Osage allottee, then th
judgment in partition, not so approved, would not be res adjudica
of the issues in the county and District courts in the administrati
proceedings.

The defendant in error, Laban Miles, sinced the petition in th

county court for the appointment of an administrator of the estate of the said Lah-tah-sah, deceased, and in said petition recited that lands allotted to the said Lah-tah-sah as a member of the Osage Tribe of Indians is Osage county, Oklahoma, amounting to about six hundred (600) acres, were included in the estate left by the deceased. These are the same lands. And although duly presented, the facts that this was a proceeding in administration, and the appeal to this Honorable Court by plaintiff in error was from a judgment of the District Court, upon an appeal from the County Court of Osage County, distributing this same land as part of the estate of Lah-tah-sah, deceased, and that Lah-tah-sah died without receiving a certificate of competency, and that both John Kenny and Laban Miles are full-blood Osage Indians, without certificates of competency, and that such state of facts would make such lands the lands of the deceased Osage allottee within the meaning and intent of said section 6 of the Act of Congress of April 18, 1912, the Honorable Supreme Court Commission overlooked the question, that if such lands belonged to the estate of Lah-tah-sah, deceased, and for that reason came within the probate Jurisdiction of the County Court of Osage County, and of the District Court on such appeal, then they were restricted under said Section 6 of the Act of
338 Congress of April 18, 1912, [the Honorable Supreme Court Commission overlooked the question, that if such lands belonged to the estate of Lah-tah-sah, deceased, and for that reason came within the probate jurisdiction of the county court of Osage county, and of the District Court on such appeal, then they were restricted under said Section 6 of the Act of Congress of April 18, 1912,] and that the said partition proceeding, which has not been approved by the Honorable Secretary of the Interior as required by said section 6 of the Act of Congress of April 18, 1912, would not be res adjudicata of the issues in such administration. And the said Honorable Supreme Court Commission overlooked the fact that if such lands were the lands of Lah-tah-sah for the purpose of administration, as the said Laban Miles has affirmed in his petition for administration, and if such lands were part of the estate of the said Lah-tah-sah, deceased, as was found in said partition judgment pleaded as res adjudicata, then they were such lands as were referred to as restricted lands of a deceased Osage allottee in said Section 6 of the Act of Congress of April 18, 1912; and that it was a fundamental error and absurd contradiction for the Supreme Court to affirm a judgment of the lower court distributing these lands on the theory that they did belong to the estate of the deceased; by sustaining such plea of res adjudicata on the theory that they did not so belong to such estate and therefore were not restricted; and we submit that such is the legal effect of the order of this Honorable Commission affirming the judgment below.

(*b*) And, although duly presented, this Honorable Court, and the Honorable Commission, overlooked the case, and the effect of the case, of Aaron et al. v. United States, 123 C. C. A. 265, 204 Federal 943, in which the U. S. Circuit Court of Appeals for this circuit, with reference to a proceeding affecting the allotment of

Cena June, an Osage woman who died before receiving her deed, held:

339 "The agreed statement of facts, upon which the case was heard and the decree was found, contained a stipulation that under the act of June 28, 1906, Cena June, who was a duly enrolled member of the Osage Tribe of Indians in Oklahoma, received as her homestead allotment the lands last described and set forth as her homestead allotment in paragraph 2 of the amended bill, and * * * that said Cena June was duly allotted as a member of said Tribe said lands set forth as her surplus selection in the amended bill herein. Consequently, it is too late now for the appellants to claim that the selection, the designation of the homestead, and allotments, were not made until after the death of Cena June. The court below could not and did not hear or decide this case upon that theory, and this court may not. The fact that the deeds of these allotments were subsequently made to the heirs of Cena June after her decease is immaterial. When the allotment had been made, the equitable title, the right to the legal title, and the entire beneficial interest in these lands, subject to the restriction upon alienation imposed upon them by the Act of Congress at the time they were allotted, vested in the allottee, and the title to these allotments under the subsequent deeds to her heirs related back to and took effect at the time of the allotments. There is, therefore, no escape from the conclusion that the titles of the heirs to the homestead lands and the surplus lands of this allottee were subject to the respective restrictions imposed upon those classes of lands by the Act of June 28, 1906."

That is, the supreme court commission overlooked the fact and question, that the case at bar was prosecuted upon the theory that these lands were the lands of Lah-tah-sah, that the court rendering the judgment in such proceeding had jurisdiction of such lands only upon the theory that they were the lands of Lah-tah-sah, or belonged to her estate, and the fact that the very judgment pleaded as res adjudicata contained a judicial finding that these lands were of the estate of Lah-tah-sah, deceased, and came within the principle laid down in the Aaron case, and failed to apply the rule in the Aaron case, which is the only authoritative decision upon this state of facts. The decisions by the United States Supreme Court and other courts relative to allotments and inheritance under the law relating to the Five Civilized Tribes, and the recent decision of the United States Supreme Court in the Coleman cases, which was followed by the Honorable Supreme Court Commission in this decision, are not applicable to the facts in this case, as the litigation

340 affecting the lands of the Osage Indians, and as Coleman was a white man and not a member of the Osage Tribe of Indians, and therefore not within the protective policy of Congress with respect to such Indians.

Plaintiff in error submits that the finding of the Honorable Supreme Court Commission, that such lands were selected and allotted to Lah-tah-sah after her decease, is without any support whatever in the record, and that the fact that the deeds were not issued until

after Lah-tah-sah's decease is a matter wholly immaterial, as the deeds, when issued, related back; and that defendant in error is estopped to deny that these lands were selected and allotted to Lah-tah-sah in her lifetime by the fact that he asked that administration be had upon these lands as a part of the estate of Lah-tah-sah, and that he secured a determination in the partition proceeding that these lands were of the estate of the said Lah-tah-sah, and because this case was instituted and prosecuted below on the theory that these lands belonged to the estate of the said Lah-tah-sah, deceased, and that the judgment below can be affirmed only on the theory that these lands are part of the estate of Lah-tah-sah; and if part of her estate, then they are restricted lands of a deceased Osage allottee within the meaning of Section 6 of the Act of Congress above referred to, and said partition judgment was invalid until approved by the Honorable Secretary of the Interior, and not being so approved it was not res adjudicata of any issue in the administrative proceeding; and that because the lower court did hold that it was res adjudicata, did overrule the demurrer of plaintiff in error thereto, did strike out a portion of plaintiff in error's answer challenging the truth of such plea, and did permit defendant in error to introduce such partition judgment as conclusive of the issues in such administration, this plaintiff in error was greatly wronged and deprived of his rights under the laws of the United States and
341 the treaties of the Osage Tribe of Indians, and under the Constitution and the laws of the State of Oklahoma, and notwithstanding the first petition herein for rehearing was overruled, this Honorable Court should give plaintiff in error another hearing and should re-examine the whole case for the purpose of doing justice herein.

JOHN EMBRY,
EMBRY, CROCKETT & JOHNSON,
Attorneys for Plaintiff in Error.

If the Honorable Supreme Court will permit, we desire to suggest with reference to the foregoing, that the judgment of the court below should be reversed, either upon the theory that it had no jurisdiction of these lands because they were not of the estate of Lah-tah-sah, deceased; or if they belonged to the estate of Lah-tah-sah, deceased, they were restricted lands under the Act of Congress referred to, and it was error for the trial court to sustain the plea of res adjudicata and to cut off the right of the plaintiff in error to show that the said Laban Miles was not married to plaintiff in error's mother, as was done in this case. Because of that old judgment, which had not been approved by the Secretary of the Interior, this plaintiff in error, John Kenny, was denied the right in the administrative proceeding to show that he was the sole heir of his mother, that Laban Miles was not married to his mother, and that if Laban Miles were given one-half of that estate it would to that extent deprive John Kenny of what he was rightfully entitled to. This son and heir of Lah-tah-sah was denied the right in the administrative proceeding to impeach the claim of Laban Miles to one-

half the estate, because of this old partition proceeding, which, we submit, was started under and by virtue of the Act of Congress above referred to and which had no validity until approved by the
342 Secretary of the Interior; that in fact it was not a judgment at all, but merely an administrative proceeding in aiding the Secretary of the Interior in the administration of Indian affairs, and the court's proceeding being subject to executive review made such partition judgment a ministerial and not a judicial proceeding.

See United States v. Ferreria, 18 How. 41, 14 L. Ed. 42.
Gordon v. United States, 2 Wall. 561, 17 L. Ed. 921.
In the matter of Sambora, 143 U. S. 222, 37 L. Ed. 429.
LaAbia Silver Mining Co. v. U. S. 175 U. S. 455, 44 L. Ed. 234.
Muskrat v. U. S. 219 U. S. 346, 55 L. Ed. 246.
Cochran et al. v. Blank et al., 156 Pac. 324, — Okla.
Hope v. Foley, 157 Pac. 727, — Okla.
Tiger et al. v. Creek County, 146 Pac. 912, — Okla.

And even if the partition judgment did have judicial character, since it was subject to the approval of the Secretary of the Interior it was not final, and could not be pleaded as res adjudicata.

Bigelow on Estoppel, 64 65.
23 Cyc., 1128.

In the proceeding, and in our brief and oral argument, we admitted that the deeds were not issued until after the death of Lah-tah-sah, but we did not admit that the lands were not selected or allotted until after her death. The case was in court and the court claimed jurisdiction of the lands only on the theory that they were a part of Lah-tah-sah's estate, and the judgment could be affirmed with respect to these lands only on the theory that they were a part of Lah-tah-sah's estate, and if they were a part of Lah-tah-sah's estate, they were restricted lands within the meaning of the Act of Congress above referred to, making it necessary that the Secretary approve such a judgment in partition before it would have any
343 validity whatsoever; and we cannot understand how the Supreme Court Commission could allow the lower court to keep jurisdiction of these lands for the purpose of distributing them as the estate of the deceased, and affirming this judgment upon the theory that they were not of her estate and therefore not within the restriction of the above Act of Congress. We did contend, and still contend, that the Osage allotment act is essentially and radically different from the allotment legislation relating to the Five Civilized Tribes; that before such partition among the Osage members, the Tribe held the title to the Reservation in trust for the members; that it was then subject to restrictions against alienation without the affirmative consent of Congress; and that that restriction followed every particle of the land, however distributed to members of the Tribe, until it was removed by Act of Congress; and that the provisions of the Osage Act imposing restrictions should be construed to cover every part of the land so distributed to members of the

Tribe; and that either upon this theory, or upon the narrower theory that it must be allotted to the allottee before her death, these were restricted lands. If the restrictions existing and continued by the allotment act covered these lands, then our contention that they are restricted lands is correct, but if the restrictions exist only by virtue of the provisions of the allotment act and are imposed only upon lands allotted within the lifetime of the allottee, still these are restricted lands under the facts and admissions in this case, and should be so considered.

We submit that there is no logical theory upon which this administrative proceeding can be sustained as affecting these lands except they were allotted to Lah-tah-sah in her lifetime and were a part of her estate at her decease, and therefore restricted lands
344 touching which a partition judgment is of no validity until approved by the Secretary of the Interior, and these decisions relating to the legislation of the Five Civilized Tribes and to Coleman, a white man who heired an Osage allotment and who was not a member of the Osage Tribe and not within the manifest policy of Congress to protect Indians, are wholly irrelevant here, and we submit that we are so convinced of the fundamental error and contradiction involved in the affirmance of this judgment that we hope the Court will consider this petition for a rehearing, and will take this case up and re-examine it, as it involves an important question of law touching the restrictions, or law of restrictions, upon a large part of the lands in the Osage Indian Reservation, and so important that the decision of it should not be left permanent with so little consideration.

JOHN EMBRY,
EMBRY, CROCKETT & JOHNSON,
Attorneys for Plaintiff in Error.

Endorsed: No. 7708. In the Supreme Court of the State of Oklahoma. John Kenny, Plaintiff in error vs. Laban Miles, et al., Defendants in Error. Petition for Rehearing. Embry, Crockett & Johnson, Okla. City, Okla., Attorneys for p't'f in error.

345 In the Supreme Court of the State of Oklahoma.

No. 7708.

JOHN KENNY, Plaintiff in Error,

vs.

LABAN MILES et al., Defendant in Error.

Opposition of Defendant in Error to the Application of the Plaintiff in Error for Leave to File Second Petition for Rehearing.

We have carefully examined the application of plaintiff in error for leave to file a second petition for rehearing, and fail to find any

question or matter presented that has not been fully passed upon by the court in its consideration of the original case, and in overruling the petition for rehearing heretofore filed, considered, and overruled.

In this connection, we call the Court's attention to typewritten answer of the defendant in error to the petition for re-hearing, and kindly ask the court's consideration of same before leave is granted plaintiff in error to file a second petition for re-hearing.

The opinion rendered by the court on January 2d is a very able and well-considered opinion, and covers every question presented by counsel in their petition for re-hearing, which was overruled on January 30th, 1917, and covers every question presented by the second petition for re-hearing, leave to file which has been asked.

346 Counsel in their proposed second petition for rehearing insists that, if the lands in question were not allotted to Lah-tah-sah in her life-time, then same did not constitute a part of her estate. This contention is in direct conflict with the rule announced in the case of the Levindale Lead and Zinc Mining Company vs. Coleman, decided June 5th, 1916 U. S. A. D. v. Opinions 1915, p. 644. In the Levindale-Coleman case, Joseph Coleman, who was given the allotment number, 2098, died February 27th, 1906, and Mary Coleman, his mother, who was given the allotment before the passage and approval of the Osage Allotment or Division Act, but subsequent to January 1st, 1906, the date of the establishment of the roll. The lands here in question were of the estate of Joseph and Mary Coleman, and, as such, descended to their legal heirs, one of which was Charles Coleman.

To the same effect is the holding of the Supreme Court of the United States in Sizemore vs. Brady, 235 U. S. 441, 59 L. Ed. 308; Woodward vs. De Graffenried, 238 U. S. 284, 59 L. Ed. 1310; Skelton v. Dill, 235 U. S. 206, 59 L. Ed. 198; Mullen vs. United States, 224 U. S. 448, 56 L. Ed. 834. To the same effect is the holding of the Circuit Court of Appeals of the Eight- Circuit in Welty vs. Reed, in 231 Fed. 930.

The decision rendered by this court in the case at bar is a correct interpretation of the law, and is in harmony with the opinions of the Supreme Court of the United States in the cases just cited, and any other rule or holding would be in direct conflict with the rule announced by the Supreme Court of the United States.

We submit that no sufficient showing was made by plaintiff in error in his first petition for re-hearing to warrant granting
347 the same, and that said petition for re-hearing was properly overruled. We further submit that no sufficient showing has been made in the ten-ative second petition for rehearing to warrant permission being given for the filing of same, and therefore object to leave being granted for the filing of said proposed second petition for rehearing.

Respectfully submitted,

H. P. WHITE,
Att'y for Def't in Error Laban Miles.

Endorsed: 7708. Filed in Supreme Court of Oklahoma, Feb. 23, 1917. William M. Franklin, Clerk.

348 And thereafter, on June 6th, 1917, an order was made denying leave to file second petition for rehearing and correcting opinion, as follows:

Supreme Court, April Term, 1917, June 6th, 1917, Twenty-third Judicial Day.

No. 7708.

JOHN KENNY

vs.

LABAN MILES et al.

And now on this day it is ordered by the court that the application for leave to file second petition for rehearing in the above cause be, and the same is hereby denied, and the original opinion filed in said cause is withdrawn for correction, same is corrected and is hereby refiled.

349 Filed Jan. 2, 1917. William M. Franklin, Clerk.

Refiled June 6, 1917. William M. Franklin, Clerk.

Jan. 2, 1917, by the Court; Adopted in Whole.

In the Supreme Court of the State of Oklahoma, Supreme Court Commission, Division Number Three.

No. 7708.

JOHN KENNY, Plaintiff in Error,

vs.

LABAN MILES, and JOHN L. BIRD, Administrator of the Estate of Lah-tah-sah, Osage Allottee, No. 256, Deceased, Defendants in Error.

Syllabus.

1. The Act of Congress of June 28, 1906, c. 3572, 34 Stat. L. 539, placed no restrictions upon the alienation by heirs of inherited lands allotted and deeded in the right of a member of the Osage Tribe of Indians after his death, save only the mineral interests therein, reserved to the Tribe, individual disposition of which is expressly inhibited.
2. The purpose of the Act of Congress of April 15, 1912, 37 Stat. L. 86, c. 83, was not to impose restrictions upon alienation of Osage lands, but to authorize the conveyance of such of said lands to which restrictions had attached by reason of their allotment to living members of the tribe, who had subsequently died, leaving surviving them Indian heirs, members of the tribe, to whom certificates of competency were issued.

Error from the District Court of Osage County.

A. R. Musseller, Special Judge.

Action by John Kenney, plaintiff, against Laban Miles, et al., Defendants. Judgment for defendant and plaintiff brings error. Affirmed.

Edward R. Hastings, Paul Van Winkle, John Embry, Attorneys for Plaintiff in Error.

H. P. White, Attorney for Defendant in Error.

350 BLEAKMORE, *C.:*

Plaintiff in error seeks the reversal of a judgment of the district court of Osage County, rendered April 2, 1915, upon appeal from the county court of that county, ordering a distribution of the estate of a deceased member of the Osage Tribe of Indians, consisting of lands selected and patented in her name subsequent to her death, and certain proceeds arising from the rental thereof.

The decedent Lah-tah-sah, a member of the Osage Tribe, entitled to a distributive share of the tribal property by virtue of an Act of Congress approved June 28, 1906, (Stat. L. 935), died intestate in 1908, before receiving the same. After her death the lands involved were selected in her right and deeds therefor, approved by the Secretary of the Interior, were executed in her name as grantee, and recorded. These lands descended to her heirs according to the laws of the State of Oklahoma.

On February 28, 1913, Laban Miles, defendant in error, began an action in the district court of Osage County to effect a partition of said lands, alleging that he was the surviving husband, and John Kenney, the plaintiff in error, the only child of Lah-tah-sah, and that upon her death each succeeded to an undivided one-half of the lands thereafter allotted and patented in her name. To this petition John Kenney filed his answer and cross-petition, averring that he was the only heir of the decedent, the sole owner, in constructive possession of the premises, and entitled to the exclusive possession thereof; that the claim of Laban Miles constituted a cloud upon his title, etc., and prayed for relief accordingly. The sole controverted issue of fact in this action was the marriage of Laban Miles to Lah-tah-sah. The court after hearing evidence,
351 made elaborate findings of fact, determined such issue in favor of Miles, ordered partition of the lands, and appointed commissioners for such purpose. Later the administrator of the estate of Lah-tah-sah filed his final report in the county court of Osage County, praying a distribution of the portion thereof in his possession, consisting of the lands allotted in her name, and the income therefrom. John Kenney appeared in such proceeding and asserted that he was the sole heir of Lah-tah-sah, and entitled to the entire estate. Laban Miles responded, setting forth that such claim had been tried and finally determined by the district court

of Osage County in the partition action, and pleaded the judgment therein as conclusive of the rights of Kenny and himself to share equally in the distribution of said lands and proceeds. To this plea of res judicata, Kenny demurred. The demurrer was overruled, and upon hearing the property was ordered distributed equally between him and Miles. Appeal was had to the district court, with like result.

Both Kenny and Miles are members of the Osage Tribe and neither has received a certificate of competency.

The provisions of the Act of July 28, 1906, supra, are fully set forth in the opinion of the Supreme Court of the United States in Levindale Lead & Zinc Mining Co. v. Coleman (Co. App. Ad Sheet, July 15, 1916, p. 644), as follows:

"That act provided that the roll of the Osage Tribe as it existed on January 1, 1906, with the additions specified, should be the
352 roll of the tribe and constitute its 'legal membership.' Children born between January 1, 1906, and July 1, 1907, to persons whose names were on the roll on the first-mentioned date, 'including the children of members of the tribe who have, or have had, white husbands,' were to be recognized as members for the purpose of the division. (Sec. 1). All lands were to be divided 'among the members of said tribe, giving to each his or her fair share thereof in acres' as specifically set forth; that is, 'each member' as shown by the roll was to be allowed to make three selections of 160 acres each in the manner described. (Sec. 2.) Restrictions were imposed as follows:

" 'Each member of said tribe shall be permitted to designate which of his three selections shall be a homestead, and his certificate of allotment and deed shall designate the same as a homestead, and the same shall be inalienable and nontaxable, until otherwise provided by act of Congress. The other two selections of each member, together with his share of the remaining lands allotted to the member, shall be known as surplus land, and shall be inalienable for twenty-five years, except as hereinafter provided,' (Sec. 2, Fourth).

"After 'each member' has made the three selections the remaining lands of the tribe, except as stated, were to be divided 'as equally as practicable among said members by a commission to be ap-
353 pointed' (Sec. 2, fifth). The Secretary of the Interior in his discretion, at the request of any 'adult member of the tribe,' was to issue 'to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded him by reason of his act, except his homestead, which shall remain inalienable and nontaxable for a period of twenty-five years, or during the life of the homestead allottee,' if, upon investigation, 'he shall find any such member fully competent' to care for his affairs. It was provided that upon the issuance of such a certificate of competency the lands of such 'member,' except homestead lands, should 'become subject to taxation,' and that 'such member,' except as provided, should have the right to 'manage, control and dispose of his or her lands the same as any citizen of the United States.' It was further provided that the surplus lands should be 'nontaxable' for the period

of three years from the approval of the act 'except where certificates of competency are issued or in case of the death of the allottee, unless otherwise provided by Congress' (Sec. 2, Seventh). Oil, gas, coal or other minerals 'covered by the lands' were 'reserved to the Osage Tribe for a period of twenty-five years' (Id. Sec. 3). All funds belonging to the tribe, and moneys accruing to it, were to be 'held in trust by the United States for the period of twenty-five years' from January 1, 1907, except as provided. The funds of the tribe, and moneys accruing from the sale of Kansas Lands, together with those due upon claims against the United States, were to be segregated and placed to the credit of the 'individual members' of the tribe 'on a basis of a pro rata division,' or 'to their heirs as hereinafter provided,' and such credit was to draw interest, to be 'paid quarterly to the members entitled thereto;' and the disposition of royalties from mineral leases was specially prescribed. (Sec. 4.) At the expiration of twenty-five years from January 1, 1907, the lands, mineral interests, and moneys held in trust by the United States were to be the absolute property of the 'individual members' of the tribe, according to the roll, 'or their heirs, as herein provided,' and deeds were to be issued accordingly (Sec. 5). Sections 6 and 7 are as follows:

354

"Sec. 6. That the lands, moneys, and mineral interests, herein provided for, of any deceased member of the Osage Tribe shall descend to his or her legal heirs, according to the laws of the territory of Oklahoma, or of the state in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys and mineral interests, must go to the mother and father equally.

" 'Sec. 7. That the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided; and said members, or their heirs, shall have the right to use and to lease said lands for farming, grazing, or any other purpose not otherwise specifically provided for herein, and said members shall have full control of the same, including the proceeds thereof: Provided, That parents of minor members of the tribe shall have the control and use of said minors' lands, together with the proceeds of the same, until said minors arrive at their majority: And provided further, That all leases given on said lands for the benefit of the individual members of the tribe entitled thereto, or for their heirs, shall be subject only to the approval of the Secretary of the Interior.'

355

"Deeds to the Osage lands were to be executed by the principal chief, but were not to be valid until approved by the Secretary of the Interior (Sec. 8), and it was further provided that whatever was necessary to carry into effect the provisions of the act should be done under the authority of this officer (Sec. 8). Regulations have been adopted by the Secretary of the Interior governing the leasing (under Secs. 7, 12) of lands 'allotted to Osage Indians.' These provide, among other things, that 'lands of deceased allottees may be leased

by the heirs jointly,' as stated. (Regulations 11, 12, approved October 25, 1910; 8, approved June 17, 1913.)"

By joint congressional resolution approved February 27, 1909 (35 Stat. at Law. 1167) it is provided:

"That homesteads of members of the Osage Tribe of Indians in Oklahoma may consist of land designated from any one or more of their first three allotment selections taken under the Act of Congress approved June twenty-eighth, nineteen hundred and six, entitled, "An Act for the division of the lands and funds of the Osage Indians in Oklahoma Territory, and for other purposes,' the designation thereof to be subject to approval by the Secretary of the Interior."

356 By Sec. 6 of an Act of Congress of April 15, 1912, (— Stat. at L. —), it is provided:

"That from and after the approval of this act the lands of deceased Osage allottees, unless the heirs agree to partition the same, may be partitioned or sold upon proper order of any court of competent jurisdiction in accordance with the laws of the State of Oklahoma: Provided, That no partition or sale of the restricted lands of a deceased Osage allottee shall be valid until approved by the Secretary of the Interior. Where some of the heirs are minors, the said court shall appoint a guardian ad litem for said minors in the matter of said partition, and partition of said land shall be valid when approved by the court and the Secretary of the Interior. When the heirs of such deceased allottees have certificates of competency, or are not members of the tribe, the restrictions on alienation are hereby removed. If some of the heirs are competent and others have not certificates of competency, the proceeds of such part of the sale as the competent heirs shall be entitled to shall be paid to them without the intervention of an administrator. The shares due minor heirs, including such minor Indian heirs as may not be tribal members and those Indian heirs not having certificates of competency, shall be paid into the Treasury of the United States and placed to the credit of the Indians upon the same conditions as attach to segregated shares of the Osage national fund, or with the approval of the Secretary of the Interior paid to the duly appointed guardian. The same disposition as herein provided for with reference to the proceeds of inherited lands sold shall be made of
357 the money in the Treasury of the United States to the credit of deceased Osage allottees."

It is contended by plaintiff in error that the lands involved constitute the homestead and surplys allotment of a deceased member of the Osage Tribe, and by virtue of the foregoing congressional enactments are alienable only upon issuance of certificates of competency to the heirs.

Defendant in error insists that no restrictions upon alienation of the lands in question by the heirs of decedent ever existed, for the reason that such lands were not selected, nor a homestead therein

designated, by the deceased member of the tribe in her lifetime, but that such selection was made in her right and deeds therefor executed in her name after her death, and therefore such lands are neither homestead nor surplus, but constitute a separate and distinct class of allotment upon the alienation of which no restrictions were imposed by Congress.

As sustaining his contention, plaintiff in error relies upon United States vs. Aaron, 183" Fed. 347, affirmed by the Circuit Court of Appeals, 8" Circuit, in Aaron vs. United States, 204 Federal, 943, wherein it was held:

"1. Lands of full-blood Osage Indian allottees selected by and allotted to them before their decease were inalienable by their full-blood heirs in March, 1909, under the Act of June 28, 1906, c. 3572, 34 Stat. 539, 542, 541, where none of them had obtained certificates of competency.

"2. The homestead lands of such allottees were likewise inalienable by such heirs.

358 "The fourth paragraph of section 2 of the Act of June 28, 1906, c. 3572, 34 Stat. 541, provided that the homestead lands of Osage Indian allottees 'shall be inalienable and nontaxable until otherwise provided by Act of Congress.' The seventh paragraph of the same section declared that the Secretary might issue to any member of the Osage Tribe a certificate of competency, authorizing him to deed his lands, 'except his homestead, which shall remain inalienable and nontaxable for a period of twenty-five years, or during the life of the allottee."

The opinions in the case relied upon are not decisive of the question here presented, for the reason that the same was not involved or determined therein as shown by the language employed in the latter opinion, namely:

"But counsel for the appellants contend that no restriction upon alienation was ever imposed upon the lands here in question, because they were not selected by Cena June, nor did she designate her homestead therein and thus divide them into homestead lands and surplus lands, nor were they allotted to her before her decease, but they were selected and allotted to her heir after her decease, so that they constitute a different class of lands from either the homestead lands or the surplus lands, and are thus exempt from all restrictions upon their alienation under the decisions in Mullen v. United States, 224 U. S. 448, 452, 457, 32 Sup. Ct. 494, 56 L. Ed.

359 834, and Hancock v. Mutual Trust Company, 24 Okl. 391, 103 Pac. 566. A careful examination of the record, however, has satisfied us that the defendants are conclusively estopped from making this claim. The complaint alleged in its bill that a described part of the lands here in controversy was allotted to Cena June 'as the homestead of said Cena June, duly selected as and for such homestead,' and that a described portion of them was allotted to the said Cena June 'as her surplus lands.' The agreed statement of facts, upon which the case was heard and the decree was founded,

contained a stipulation that under the Act of June 28, 1906, 'Cena June, who was a duly enrolled member of the Osage tribe of Indians in Oklahoma, received as her homestead allotment the lands described and set forth as her homestead allotment in paragraph two of the amended bill,' and '* * * that said Cena June was duly allotted as a member of said tribe as the lands set forth as her surplus selection in the amended bill herein.' Consequently, it is too late now for the appellants to claim that the selections, the designation of the homestead, and the allotments were not made until after the death of Cena June. * * *."

In Levindale Lead & Zinc Mining Co. v. Coleman, supra, it is said:

"Taken in their natural sense, the provisions of the fourth paragraph of Sec. 2 apply only to allotments made to members of the tribe. There is nothing to suggest that a nonmember should
360 designate a 'homestead', and unless lands were thus segregated the restrictions as to 'homesteads', would not apply. With respect to 'surplus lands,' it will be observed that it is only selections of each 'member,' and the share of remaining lands 'allotted to the member,' which constitute lands so described and thus come under the stated restrictions. It was early ruled administratively that under Sec. 6 the right to the member's share, though unallotted in his lifetime, passed to his legal heirs as there defined, and this we assume to be the meaning of the statute. But the fact that the nonmember takes in the right of the deceased member is not enough to subject him to restrictions which are plainly imposed for the protection of members. It is urged that the restrictions, by virtue of their terms, were to run with the land until they expired by limitation or were removed (Bowling v. United States, 233 U. S. 528, 58 L. Ed. 1080, 34 Sup. Ct. Rep. 659), but restrictions would not run with the land unless they had attached. And, even where they had attached, they would run only according to the intendment of the statute. We find no indication of an intent that they should apply to lands, or an interest in ownership of white men who were nonmembers of the tribe. Emphasis is placed by the defendant in error on the provisions of Sec. 7 as to leases; but it would be an inadmissible construction of this section to say that the word 'heirs' was there used in contradistinction to 'members.' This provision as to leases, in the light of the purpose of the
361 Act, had reference, we think, to the 'individual members' who received allotments and the Indian heirs of such members.

"The view we have taken of the inapplicability of the restrictions upon alienation in a case like the present finds support in the fact that there was no provision for giving to nonmembers certificates of competency. Under the seventh paragraph of Sec. 2, any 'adult member' of the tribe, although a full-blood Indian, who could satisfy the Secretary of the Interior of his ability to transact his own business, might obtain a certificate and thus be enabled to dispose of

his 'surplus land;' but a competent white man, not a member, could not be relieved. It would seem to be evident, that such an incongr-ous result was not intended, the language plainly showing that Indians alone were deemed to be subjected to the restrictions."

It would seem that the only restriction placed upon alienation of the allotted lands of the Osage Tribe are found in the fourth paragraph of section two of the Act of June 28, 1906, supra, and "apply only to allotments made to members of the tribe."

The general scheme for division of the Osage lands was similar to that adopted for the distribution of those of the Five Civilized Tribes, contemplating, primarily, their allotment to living members of the tribe, separating the homestead and surplus and providing certain restrictions upon alienation and exemption from taxation, obviously for the better protection of the al-ottee in the quiet enjoyment thereof; but anticipating that such character of allotments would become impossible in the event of the death of members entitled thereto, Congress provided in such contingency
362 for allotments going immediately to heirs, in the right of such deceased members, of the shares of the tribal property to which they would have been entitled to receive had they survived. As to the latter class of allotments no provision was made for the segregation of the homestead and surplus, and no occasion for such separation existed, as each of said heirs, if a member of the tribe was provided with a homestead fully protected in his own right.

In neither the Osage Division Act nor the Allotment Act relating to the Five Civilized Tribes (save perhaps in one instance), was there a distinction made between heirs; they might or might not be members of the tribe, but each would take his undivided share under the particular Act in the same manner and with the same powers of disposition, unless otherwise expressly provided.

In Mullen v. United States, 224 U. S. 448, 32 Sup. Ct. 494, 56 L. Ed. 834, involving the Choctaw and Chickasaw Allotment Acts, it is said:

"It is true that under the Creek agreement, in cases where the ancestor died before allotment, the lands were to be allotted directly to the heirs, while under the Choctaw and Chickasaw agreement the allotment was to be made in the name of the deceased member, and 'descend to his heirs.' This, however, is a merely formal distinction and implies no difference in substance, in both cases the lands were to go immediately to the heirs, and the mere circumstance
363 that, under the language of the statute, the allotment was to be made in the name of the deceased ancestor instead of the names of the heirs furnished no reason for implying a requirement that there should be a designation of a portion of the land as homestead.

"We have, then, a case where all the allotted lands going to the heirs are of the same character, and there is no restriction upon the right of alienation expressed in the statute. Had the lands been

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allotted in the lifetime of the ancestor, one-half of them, constituting homestead, would have been free from restriction upon his death. The only difficulty springs from the language of paragraph 16, limiting the right of heirs to sell 'surplus' lands. But, on examining the context, it appears that this provision is part of the scheme for *allotments to living members, where there is a segregation of homestead and surplus lands respectively.* Whatever the policy of such a distinction which gives a greater freedom for the disposition by heirs of homestead lands than of the additional lands, there is no warrant for importing it into paragraph 22, where there is no such segregation. It would be manifestly inappropriate to imply the restriction in such cases so as to make it applicable to all the lands taken by the heirs, and there is no occasion or authority for creating a division of the lands so as to impose a restriction upon a part of them. (Italics ours.)

364 "There being no restriction upon the right of alienation, the heirs in the case involved in this appeal were entitled to make the conveyances. The bill alleged that the tracts embraced in these conveyances were 'allotted lands,' and certificates of allotment had been issued. These Indian heirs were vested with an interest in the property which, in the absence of any provision to the contrary, was subject of sale. The fact that they were 'full-Blood Indians makes no difference in this case, for, at the time of the conveyances in question, heirs of the full-blood, taking under the provisions of paragraph 22 of the supplemental agreement, had the same right of alienation as other heirs."

In the Mullen case, supra, the Supreme Court of the United States further says:

"While the lands were to be allotted in the name of the deceased they passed at once to his heirs, and as each heir, if a member of the tribe, was already supplied with his homestead of 160 acres, there was no occasion for a further selection for that purpose from the inherited lands. No distinction is made between the heirs; they might or might not be members of the tribe and where there were a number of heirs, each would take his undivided share.

365 It is quite evident that there is no basis for implying the requirement that in such case there should be a selection of portion of the allotment as a homestead, and all the lands allotted under paragraph 22 are plainly upon the same footing. While it appears from the record that, in the present case, separate certificates of allotment were issued for homestead and surplus lands, this was without the sanction of the statute."

In Skelton vs. Dill, 235 U. S. 206, 59 L. Ed. 198, construing the allotment Acts of the Creek Tribe it is said:

"Evidently anticipating that participation in the allotment and distribution might in some instances be cut off by death, Congress made provisions for such a contingency. * * *

"Whether these restrictions were intended to apply only to allotments made to living citizens in their own right, or to apply as well

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to allotments made on behalf of deceased members, is the question for decision. The supreme court of the state, when passing upon this case, held them applicable to both classes of allotments, but in the later case of Rentie v. McCoy, 35 Okla. 77, 128 Pac. 244, reached the other conclusion, as did also the district court for the eastern district of Oklahoma in Reed v. Welty, 197 Fed. 419. We think the better reasoning lies with the view that the restrictions apply only to allotments made to living citizens in their own right. Not only do the provisions of Sec. 16 of the supplemental act lend themselves to that view, but in those sections of both acts which
366 deal with allotments on behalf of deceased persons there is no suggestion of a restriction upon alienation. This difference in legislative treatment doubtless was deliberate, and reflects a corresponding difference in purpose. In Mullen v. United States, 224 U. S. 448, 56 L. Ed. 834, 32 Sup. C. Rep. 494, a like question arose under the original and supplemental acts relating to the Choctaw and Chickasaw lands, and we held that the restrictions upon alienation imposed by those acts were applicable to allotments to living members in their own right, but not to allotments on behalf of members then deceased. We do not perceive anything in the acts relating to the Creek lands which calls for a different conclusion. * * *"

We hold that the Act of June 28, 1906, placed no restrictions upon alienation by heirs of inherited lands allotted and deeded in the right of a member of the Osage tribe after his death, save only the interest in the minerals, reserved to the tribe, the individual disposition of which is expressly inhibited.

The evident purpose of the Act of April 15, 1912, supra, was not to impose restrictions upon alienation of Osage lands, but to authorize the conveyance of such of said lands to which restrictions had attached by reason of their allotment to living members of the tribe who had subsequently died, leaving surviving them Indian heirs, members of the tribe, to whom certificates of competency were issued.

In Levindale Lead & Zinc Mining Co. v. Coleman, it was said:

367 "* * * But it is the Act of 1912 upon which chief reliance is placed. This was 'supplementary to and amendatory of' the Act of 1906, and provides, among other things, in Sec. 6, relating to the lands 'of deceased Osage allottees,' that 'when the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed.' We lay aside the suggestion that 'deceased Osage allottees' may be taken to mean only members who received allotments in their own right while living, expressing no opinion upon that point. For not only is a legislative declaration of the intent of a previous act not absolutely controlling, but we think that in the present instance the purpose of Congress is manifest. This suit had been decided in the district court of the state in December, 1910, and it had been there held that the restriction applied to nonmembers. The case had been appealed, but it may well be supposed that Congress intended to remove the restrictions upon a nonmember, if such

a restriction could be deemed to exist. That, we are satisfied, was the object of the provision, and it was not an attempt *ot* import into the earlier Act a restriction which lay wholly outside its express terms and the policy of guardianship it was intended to execute.

We conclude that the district court of Osage County had jusrisdiction to partition the lands involved, and that its judgment was conclusive of the rights of the parties in this proceeding to share equally in the disposition of the lands in question.

In view of this conclusion it is unnecessary to determine the very interesting questions presented by the briefs relative to the capacity in which the district court of Osage County would have acted and the conclusiveness of this judgment in the event it had been held that the lands in question were restricted lands such as contemplated by the Act of April 15, 1912, supra.

It follows that the judgment of the court below should be affirmed.

368 In the Supreme Court of the State of Oklahoma.

No. 7708.

JOHN KENNY, Plaintiff in Error,

vs.

LABAN MILES et al., Defendants in Error.

Certificate of Clerk.

I, William M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing pages, 1 to 246 and 248 to 298 and 312 to 368 constitute a full, true and correct copy of the record in the above cause as called for in copy of stipulation on file in this office appearing on the front of this transcript, as is made to appear by the records and files of this office.

In witness whereof, I hereunto set my hand and affix the seal of said Supreme Court, at Oklahoma City, Oklahoma, this 3rd day of July, A. D. 1917.

[Seal Supreme Court, State of Oklahoma.]

WILLIAM M. FRANKLIN, *Clerk.*
By NEAL ORR, *Assistant.*

Endorsed on cover: File No. 25,923. Supreme Court of the United States, October Term, 1917. Term No. 486. John Kenny, petitioner, vs. Laban Miles et al. Writ of Certiorari and Return. Filed July 9th, 1917. File No. 25,923.

IN THE SUPREME COURT
OF THE UNITED STATES

JOHN KENNY,

Petitioner,

vs.

LABAN MILES AND JOHN BIRD, Administrators of the Estate of Lah-tah-sah, deceased, Osage Allottee, No. 256,

Respondents.

No _____

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

The afore-named John Kenny, petitioner, prays for a writ of certiorari, requiring the Supreme Court of the State of Oklahoma to certify to the Supreme Court of the United States, for its review and determination, case numbered 7708 in said State Supreme Court, styled "John Kenny, Plaintiff in Error, vs. Laban Miles and John L. Bird, Administrators of the Estate of Lah-tah-sah, Osage Allottee No. 256, deceased, Defendants in Error."

To the Honorable The Supreme Court of the United States:

The petitioner, John Kenny, shows to this Honorable Court and alleges, that in an action pending in the District Court of the State of Oklahoma, numbered 7708, in which this petitioner was plaintiff in error, and the respondents herein were defendants in error, final judgement and decree was made and entered against this petitioner on the 30th day of January, 1917, denying him certain title, right, privileges and immunities claimed under the statutes of the United States and especially set up and claimed by him; and that said State Supreme Court is the highest court of the State in which a decision therein can be rendered. That said action involved the contest between the alleged heirs to the estate of deceased Osage Indian Allottee, named Lah-tah-sah. That the said Lah-tah-sah, the deceased, was a full-blood Osage Indian, who died in Osage County, Oklahoma, on or about August 19, 1908, where she had been allotted lands, but not having received a certificate of competency or having had her restrictions removed. She left surviving her, this petitioner, who is her son and who is also a full-blood Osage Indian, and an allottee and member of said Tribe of Indians in Oklahoma, who has not received a certificate of competency nor had his restrictions removed; and the respondent herein, Laban Miles, who was one of the defendants in error in said State Supreme Court, is a full-blood Osage Indian and allottee and member of said Tribe in Oklahoma, who has not received a certificate of competency nor had his restrictions removed, and who claims to have been married to Lah-tah-sah before her

death, and, as her surviving husband, an heir inheriting one-half of her estate.

This case had its inception in a probate proceeding in the County Court of Osage County, Oklahoma, by a petition for administration upon the estate of the deceased, signed by the said Laban Miles, asking the appointment of John L. Bird, the other respondent herein, as administrator, and, among other things, alleging:

> "The general character and probable value of the estate left by the deceased is as follows:
>
> Lands allotted to her, as a member of the Osage Tribe of Indians, in Osage County, Oklahoma, amounting to about 660 acres, of the approximate yearly rental value of $500, and Tribal Trust Funds belonging to her, as a member of said Tribe, and to her credit in the Treasury of the United States, together with oil, gas and other mineral annuities, of the approximate yearly income of $600."

Upon the appointment of such administrator, an appraisement was had and returned into that court, as authorized by the laws governing the procedure thereof, showing the real estate of the decedent to consist of the

> Northwest Quarter (NW¼) of Section 26, Township 24, Range 4, homestead; and the East Half (E½) of Section 30, Township 28, Range 9, containing 320 acres; Lot Three (3) East Half (E½) of the Southwest Quarter (SW¼) of Northwest Quarter (NW¼),Southeast Quarter (SE¼) of the Northwest Quarter (NW¼) of Section 4, Township 20, Range 10, containing 110.12 acres; North Half (N½) of Southeast Quarter (SE¼) of Section 4, Township 20, Range 10, containing 80 acres; all North and East of the Indian Meridian in Osage County, Oklahoma.

The allotment deeds were introduced in evidence, showing that the deed conveying homestead was executed by the principal chief, September 23, 1908, and the deed conveying the surplus land, on May 5, 1909. Petitioner

above set forth, on the 25th, 26th day of April, 1913, and on the 26th day of April the trial was adjourned to the 29th day of April, 1913, at noon, at which time said trial was resumed before said special judge, all parties being present in their own proper persons and by their attorneys, and continued on trial from noon of April 29th to May 2nd, inclusive, during which said time the plaintiff introduced his testimony and rested and the defendant introduced his testimony and rested, and thereup the plaintiff offered his testimony in rebuttal and rested. And the court, after examination of the pleadings and hearing the arguments of counsel in behalf of the respective parties, took the case under advisement pursuant to consent and agreement of counsel of the respective parties and stipulation of counsel for both parties filed in said cause; and

"Now on this 24th day of May, 1913, after due consideration of all the evidence and the arguments of counsel and being fully advised in the premises, the court finds the following facts:

"That in September, 1907, the plaintiff, Laban Miles, after having been divorced from his former wife, Wah-shah-she-me-tsa-he, according to Osage Indian custom, entered into an agreement with Lah-tah-sah, whereby he and Lah-tah-sah agreed to become man and wife. That both were full-blood members of the Osage Indian Tribe and unmarried at the time. That they thereupon assumed the marriage relation and continued to sustain that relation up to the time of Lah-tah-sah's death on August 19th, 1908, a period of eleven months. That the morning after they assumed such relationship, the defendant, John Kenny, the son of Lah-tah-sah, by a former husband, received a horse given away by Hlu-ah-wah-tah, the brother-in-law of the plaintiff, Laban Miles, in honor of the marriage of Laban Miles and Lah-tah-sah, in accordance with Osage Indian custom, which horse defendant sold, appropriating the money to his own use. That on said morning other presents were given in accordance with the custom of Osage Indians at the marriage of Indians of the age of Laban Miles and Lah-tah-sah, and who had been theretofore married. That a feast was given in honor of said marriage on the morning after Laban Miles brought Lah-tah-sah to his home, but neither Laban Miles nor Lah-tah-sah were at said feast. That Laban Miles

and Lah-tah-sah went to the Osage Indian Agent and had themselves enrolled as man and wife, and a trading card was issued to Laban Miles on his own and Lah-tah-sah's quarterly annuities and payments. That Laban Miles and Lah-tah-sah were recognized by the Indians with whom they associated as man and wife until Lah-tah-sah's death. They were also recognized during this time by the Osage Indian Agency and the Interior Department. That after assuming said relationship in September, 1907, they signed various papers to borrow money as man and wife, and held themselves out as such and were so recognized by those who dealt with them in a business way.

CONCLUSIONS OF LAW.

"That plaintiff, Laban Miles, and Lah-tah-sah, Osage Allottee No. 256, were husband and wife at the time of the death of the said Lah-tah-sah; that plaintiff, Laban Mailes, is the surviving husband of said Lah-tah-sah, and as such is the owner of an undivided one-half interest in and to the lands described in plaintiff's petition.

"The court further finds that Lah-tah-sah, Osage Allottee No. 256, died intestate on or about the 19th day of August, 1908, leaving an estate consisting in part of the lands described in plaintiff's petition.

"The court further finds that the plaintiff, Laban Miles, and defendant, John Kenny, above named, are the only heirs at law of said Lah-tah-sah, deceased, and, as such, plaintiff Laban Miles owns an undivided one-half interest, and the defendant John Kenny owns an undivided one-half interest in and to the lands allotted and deeded to said Lah-tah-sah, described in plaintiff's petition, to-wit:

NW¼ of Section 26, Township 24, Range 4;
NE¼ of Section 30, Township 28, Range 9;
SE¼ of Section 30, Township 28, Range 9;
Lot 3, E½ of SW¼ of NW¼, SE¼ of NW¼, N½ of SE¼ of Section 4, Township 20, Range 10, all North and East of the Indian Base and Meridian in Osage County, Oklahoma.

"The court further finds that no part of the lands described was ever used, occupied or claimed by said Lah-tah-sah, deceased, or any of the parties

to this action, as a homestead, and that no part of same was the homestead of said Lah-tah-sah, or of any of the parties to this action. The court further finds that the parties hereto have been unable to agree upon a partition or division of said lands.

"It is therefore ordered, adjudged and decreed by the court that the plaintiff, Laban Miles, and the defendant, John Kenny, are the owners in common of the lands described, and their respective interests and ownership therein is as follows:

"Laban Miles, plaintiff, Osage Allottee No. 507, an undivided one-half.

"John Kenny, defendant, Osage Allottee No. 2857, an undivided one-half, and that the shares of the aforesaid parties and their respective interests in the lands above described as above set forth, be and the same are hereby confirmed. It is further ordered, adjudged and decreed by the court that partition of said lands be made accordingly; that W. T. Mosier, J. W. Soderstrom and W. E. Savage are hereby appointed commissioners to make partition of said property among the parties according to their respective interests as herein fixed and determined, if such partition can be made without manifest injury. But if such partition cannot be made, the commissioners herein named shall make a valuation and appraisement of the property herein described and make a report of their proceedings to the court.

R. B. Boone, Special Judge."

The journal entry of judgment attached to such plea of *res adjudicata* showed that the deceased and Laban Miles were both full-blood Osage Indians, and described lands which the court judicially knew to be a part of the Osage tribal lands which had been distributed by allotments, and that the said Lah-tah-sah was an Osage allottee, and that said lands had been allotted and deeded to Lah-tah-sah, and contained the purported finding by the court that Lah-tah-sah died intestate on or about the 19th day of August, 1908, leaving an estate consisting in part

of lands, the description of which showed them to be the same lands as hereinbefore described; and such plea of *res adjudicata* failed to show that either of such Indians had received certificates of competency or had had their restrictions removed; or that the Honorable Secretary of the Interior had approved such partition judgment as required by Section 6 of the Act of Congress, approved April 18, 1912, 37 Stat. L. 86, providing:

> "That from and after the approval of this Act, the lands of deceased Osage allottees, unless the heirs agree to partition the same, may be partitioned or sold upon proper order of any court of competent jurisdiction, in accordance with the laws of the State of Oklahoma; provided, that no partition or sale of the restricted land of a deceased Osage allottee shall be valid until approved by the Secretary of the Interior."

There being no contention that the heirs had ever consented to such partition, but the pleadings in the case showing that the petitioner resisted such.

This judgment pleaded as *res adjudicata* had been rendered by the District Court of Osage County, Oklahoma, on the date and as shown by said exhibit attached to the plea of *res adjudicata,* in an action there pending, brought by the said Laban Miles against this petitioner, and while the said administration proceeding was pending in the County Court of said County and before the return to such County Court of the final report of the administrator and before such attempted distribution of said estate. To this plea of *res adjudicata,* the petitioner filed his demurrer, alleging:

> "First. The District Court of Osage County, Oklahoma, rendering the findings and judgment therein pleaded, was without jurisdiction to render a final binding judgment therein.

Third. Said plea does not state facts entitling the said Laban Miles to any right or relief, all as appear from said plea."

Upon the consideration of this demurrer, the County Court overruled the same, to which petitioner excepted. Thereupon, petitioner filed his answer to said plea of *res adjudicata*, alleging:

"Comes now John Kenny and answering the plea of *res adjudicata* filed herein by Laban Miles, denies each and every allegation therein contained, except such as are herein expressly admitted.

"(2) For further answer, this John Kenny denies that said Laban Miles was ever married to decedent, or became or is the husband or heir of decedent.

"(3) And further answering, John Kenny alleges:

"(a) That said previous administration was a nullity and of no effect, as the court was without jurisdiction, and the said Laban Miles, having petitioned for this administration, is estopped to plead any previuos administration.

"(b) That the district court rendering the judgment set up in said plea and referred to as the action between Laban Miles, plaintiff, adn John Kenny, defendant, was without jurisdiction to hear or determine the same or to render any judgment therein; that the lands therein described were the restricted lands and allotments of the decedent, and that the decedent was a full-blood Osage allottee who had not received a certificate of competency.

"(c) That said decedent, said Laban Miles, and said John Kenny are and were members of the Osage Tribe of Indians, of the full blood, residing in Osage County, Oklahoma, neither of whom have received a certificate of competency, and all of whom were and are incompetent Indians; and the Secretary of the Interior refused and failed to confirm or approve said judgment and proceedings of said district court, and the said is void and of no effect."

Thereupon, the said Laban Miles filed his motion to strike out the paragraphs of said answer, and the said

County Court, ruling thereon, struck out the second paragraph, to which petitioner excepted.

The said cause upon the remaining issues being tried in the County Court, and a decree and judgment being rendered against petitioner, the petitioner, within the time and in the manner authorized by the State Laws and Code of Procedure with respect thereto, appealed therefrom to the District Court of Osage County, Oklahoma, and demanded trial therein on both questions of law and fact. And in this manner the said action became one pending in the District Court of Osage County, Oklahoma, on appeal from the County Court of said County. Upon the consideration and judgment of said District Court, the said Court considered and overruled petitioner's demurrer to said plea of *res adjudicata*, to which petitioner excepted.

Thereupon, the said District Court, upon consideration of said Laban Miles' motion to strike, ordered and struck from the answer of petitioner, paragraphs 2, 3-a, 3-b and 3-c, to each and all of which rulings petitioner excepted.

And thereafter, the said cause being tried in said District Court upon the remaining issues in said case, said court, over the objection of petitioner, admitted in evidence the said judgment rendered in said partition action and attached to said plea of *res adjudicata* as above, to which ruling petitioner objected.

That the testimony, and all the testimony, in the trial of said cause showed that the petitioner, the said Laban Miles and the said Lah-tah-sah, deceased, were each and all full-blood Osage Indians, members of that Tribe in Oklahoma, and that neither of them had re-

ceived a certificate of competency or had their restrictions removed; that the said petitioner had not consented to the partition of said lands; and that the said partition judgment attached to said plea of *res adjudicata* and offered in evidence had not been approved by the Honorable Secretary of the Interior; that no actual partition or sale of any of said land had been made; and that none of the proceedings in said partition action had been approved by the Secretary of the Interior.

And said District Court, holding that said judgment in the partition action previously rendered was *res adjudicata* of the same issues in such proceeding in administration, denied the petitioner the several rights especially set up by him, and rendered judgment and decree against him and in favor of the said Laban Miles, decreeing that the said Laban Miles was an heir-at-law of said deceased, and was entitled to inherit one-half of her estate, and distributed one-half to him, to which petitioner objected. Thereupon the petitioner duly appealed to the Supreme Court of the State of Oklahoma, which action was therein numbered 7708 and styled "John Kenny, Plaintiff in Error, vs. Laban Miles and John L. Bird, Administrator of the Esate of Lah-tah-sah, Osage Allottee No. 256, deceased, Defendants in Error," that being the highest court of the State in which a judgment or decision in said case could be rendered. Petitioner denies that said Laban Miles was married to or is the husband and heir of said deceased, and was ready and stands ready to so prove.

Upon the due presentation of such appeal to said State Supreme Court, upon the opinion of one of its Com-

missions, authorized by the state laws so to act and to prepare opinions, which was approved by the said Supreme court, a copy of which opinion is contained in the transcript attached to the petition herein, said State Supreme Court, holding that said lands were selected in the right of Lah-tah-sah after her death, affirmed the judgment and decree of the District Court. The State Supreme Court considered the Act of Congress of June 28, 1906, the Osage Allotment Act, 34 Stat. L. 539, the Joint Resolution of Congress approved February 27, 1909, 35 Stat. L. 1167, the Act of Congress of March 3, 1909, 35 Stat. L. 778, and the Act of Congress of April 18, 1912, 37 Stat. L. 86, and held:

> "The Act of Congress of June 28, 1906, Chap. 572, 34 Stat. L. 539, placed no restrictions upon the alienation by heirs of inherited lands allotted and deeded in the right of a member of the Osage Tribe of Indians after his death, save only the mineral interests therein, reserved to the Tribe, individual disposition of which is expressly inhibited."

> "That the purpose of the Act of Congress of April 18, 1912, 34 Stat. L. 86, Chap. 83, was not to impose restrictions upon alienation of Osage lands, but to authorized the conveyance of said lands to which restrictions had attached by reason of their allotment to living members of the Tribe, who had subsequently died, leaving surviving them Indian heirs, members of the Tribe, to whom no certificates of competency were issued."

And, also:

> "That the District Court of Osage County had jurisdiction to partition the lands involved, and that its judgment was conclusive of the rights of the parties in this proceeding to share equally in the disposition of the lands in question."

Petitioner alleges that the said Lah-tah-sah, as a member of the Osage Tribe of Indians, was allotted said

tracts of land, and this petitioner inherited the same upon her decease, under and by virtue of the said Act of Congress of June 28, 1906, that the instant case, being a proceeding originating in the County Court of Osage County, Oklahoma, in the exercise of its probate jurisdiction, proceeded upon the theory that said lands were of the estate of the said Lah-tah-sah, deceased. The said Laban Miles, in the recitals of the petition filed by him for the appointment of the said administrator, recited that such lands had been allotted to the said Lah-tah-sah, as aforesaid. The return of the appraisers in said action showed that one tract thereof was designated as the homestead; and the purported judgment in partition pleaded as *res adjudicata* showed that Lah-tah-sah died intestate on or about the 19th day of August, 1908, leaving an estate consisting in part of the same lands; and the case was tried in the County and District Courts upon the theory that said lands were of the estate of the said Lah-tah-sah, deceased, and had been allotted to her; and there was no evidence that the lands had been selected or allotted after the death of the said Lah-tah-sah. However, the testimony showed that the allotment deeds had been executed and approved after her death. That such lands were subject to the restrictions imposed by the said Act of Congress of June 28, 1906, and of March 3, 1909, and were and are the restricted lands of a deceased Osage Indian allottee, within the meaning of the said Act of Congress of April 18, 1912, providing that the partition thereof shall be invalid until approved by the Secretary of the Interior.

A certified copy of the entire transcript of record of the case, including the proceeding in the Supreme Court

of the State of Oklahoma and the opinion and judgment of said court, marked "Exhibit A," is hereto attached, as an exhibit to this petition.

Your petitioner believes and alleges that said judgment and decress of the said Supreme Court of the State of Oklahoma in said case is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination with the same power and authority and with like effect as if brought up by writ of error, as authorized by law, and as general reasons relied on for the allowance of said writ of certiorari, your petitioner alleges that the said State Supreme Court considered fully the federal questions involved and denied the petitioner the title, rights, privileges and immunities under such federal statutes especially set up and claimed by him:

(a) In affirming the judgment overruling petitioner's demurrer to such plea of *res adjudicata.*

(b) In affirming the judgment sustaining the ruling of the trial court, striking out the designated paragraphs of petitioner's answer.

(c) In affirming the judgment of the trial court admitting incompetent evidence offered by said Laban Miles with respect to such pleo of *res adjudicata.*

(d) In affirming the judgment of the trial court rejecting and excluding competent testimony offered by petitioner, that the said Laban Miles had not been married to and was not the husband or heir of the said decedent.

(e) In finding and holding that such lands had been selected in the right of the said Lah-tah-sah after her death; and in failing to find and hold that the said lands had been selected and allotted to the said Lah-tah-sah before her death, and that the said Laban Miles, because of the facts and admissions in the record and the theory of the proceeding, and

upon which the case was tried below, was estopped to deny that the said lands were the lands, and the restricted lands, of the said deceased Osage allottee.

(f) In failing to find and to hold that the said lands involved were the restricted lands of a deceased Osage allottee, and that the judgment and proceedings pleaded as *res adjudicata*, not having been approved by the Honorable Secretary of the Interior, were invalid, and not decisive of any of the issues involved in such administration proceeding, and not evidence of the truth of any of its purported findings or recitals.

(g) In holding that the Act of Congress of June 28, 1906, Chap. 572, Stat. L. 539, placed no restrictions upon the alienation by heirs to inherited lands allotted and deeded in the right of a member of the Osage Tribe of Indians after his death, save only the mineral interest therein, reserved to the Tribe, individual disposition of which is expressly inhibited. And the said State Supreme Court erred in failing to find and to hold that the said Act of Congress did place restrictions upon said lands and the Act of Congress of March 3, 1909, 35 Stat. L. 778, imposed restrictions on such lands and continued previous restrictions thereon; and in failing to find and to hold that the Osage tribal lands in Oklahoma, of which these allotments were parts, were subject to restriction and held by the Tribe, and that such restrictions, under the legislation for the division of such lands among the members of such Tribe, continued until certificates of competency were issued to the allottee, or the same was sold under the rules and regulations and subject to the approval of the Honorable Secretary of the Interior.

(h) And in finding and in holding that the purpose of the Act of Congress of April 18, 1912, 37 Stat. L. 86, Chap. 83, was not to impose restrictions upon alienation of Osage lands, but to authorize the conveyance of such of said lands to which restrictions had attached by reason of their allotment to living members of the Tribe, who have subsequently died, leaving surviving them Indian heirs, members of the Tribe, to whom certificates of competency were issued; and said Supreme Court erred in not holding that the purpose of said Act of Congress was to restrict the partition of lands of the character herein

involved subject to the approval of the Honorable Secretary of the Interior.

(i) And in holding that the District Court of Osage County had jurisdiction to partition the lands involved, that its judgment was conclusive of the rights of the parties in this proceeding to share equally in the disposition of the lands in question; and the said State Supreme Court erred in not holding that the said judgment of the District Court of Osage County, partitioning said lands, not being approved by the Honorable Secretary of the Interior, was invalid for any purpose whatever.

(j) In depriving petitioner of one-half of such trust funds and allotted lands by the use and means of such partition judgment, which was invalid and of no force for the purpose for which it was rendered.

(k) In giving force indirectly to such invalid judgment, when it was not enforceable directly.

(l) In depriving petitioner of the rights and privileges of the guardianship of the Government and the protection and supervision of the Honorable Secretary of the Interior with respect to such inherited Indian lands.

(m) In denying petitioner immunity from the operation and effect of said partition judgment until the same is approved by the Honorable Secretary of the Interior.

(n) In affirming the judgment of said District Court and denying petitioner a re-hearing therein and thereof.

That the said decision, judgment and decree of the State Supreme Court is final, and is the judgment and decree of the highest court of the State that can pass on the case, and this petitioner has no other remedy at law.

The petitioner has been denied the right to refute the issues which took from him one-half of this estate by a judgment not approved by the Secretary of the Interior and having no validity until it was so approved; and these rights, title, privileges and immunities taken from him, were given him under, and protected by, the said statutes of the United States. Notwithstanding the issues in-

volved were tried in said partition proceeding, yet, Congress, for reasons it considered sufficient, placed the Osage Indians of petitioner's class under the protection of the Secretary of the Interior; and, notwithstanding the findings and judgment for the partition of this land, the Honorable Secretary of the Interior has never seen fit to approve it; and if the result was so inequitable and unfair that the Secretary would not approve it, your petitioner submits that he should have had the right, in this administration proceeding, to a fair trial of these issues.

The said State Supreme Court, in the decision in this case, laid down rules of law necessarily affecting many like cases and much of the lands allotted to Osage Indians, and involving the rights of a great many of such Indians, and the issues herein not having been heretofore affirmatively decided by this Honorable Court, we submit that this case is one of that public interest and importance and that petitioner's contentions have that merit that the writ of certiorari should issue in this case.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court, to the Supreme Court of the State of Oklahoma, requiring that the said cause, and the whole record thereof, be certified and removed to this court for review and determination, in the manner as provided by law and the rules of this court, to the end that the said case may be reviewed and determined by this Honorable Court with the same power and authority and with like effect as if brought up by writ of error, and that your petitioner may have such other and further relief or remedy in the premises as to this court may seem appro-

priate and in conformity with law, and that the said judgment and decree of said Supreme Court of the State of Oklahoma in the said case, and every part thereof, may be reversed by this Honorable Court.

John Kenny
Petitioner.

By John Embry, Atty for petitioner
Elmer K. Hudson
Charles D. Fuller
Counsel for Petitioner.

State of Oklahoma, } ss.
Oklahoma County, }

John Embry, being duly sworn, says that he is one of the counsel for John Kenny, the petitioner; that he prepared the foregoing petition and that the allegations thereof are true, as he verily believes.

JOHN EMBRY.

Subscribed and sworn to before me by John Embry, this, the 12th day of April, A. D. 1917.

My commission expires Jan. 31, 1918.

(SEAL) J. I. TURNER, Notary Public,
Oklahoma County, Oklahoma.

APR 28 1917
JAMES D. MAHER
CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

JOHN KENNY,

Petitioner,

vs.

LABAN MILES AND JOHN L. BIRD, Administrators of the Estate of Lah-tah-sah, deceased, Osage Allottee, No. 256,

Respondents.

No. 1093

BRIEF OF PETITIONER,

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA.

STATE CAPITAL PUB. CO., OKLAHOMA CITY, OKLA.

INDEX.

PAGE.

STATEMENT OF THE CASE..... 1-8

Question Involved: Did the Supreme Court of the State of Oklahoma deny petitioner the title, rights, privileges and immunities under the statutes of the United States especially set up and claimed by him as an heir of a deceased Osage allottee?

It is contended that the court did so in affirming the judgment below, overruling petitioner's demurrer, striking out paragraphs of petitioner's answer, in admissions of evidence, and in findings with respect to time of allotments.

Where, for the purpose of trial, it is admitted that lands were allotted to a deceased Osage allottee in her lifetime, the theory of the case will not be changed on appeal, and, as affecting questions of restriction, it is immaterial that the deeds are not executed until after her death.

Aaron et al. vs. *U. S.*, 204 Fed. 943..... 11

2. The State Supreme Court erred in holding that the Act of Congress of June 28, 1906, the Osage Allotment Act, placed no restriction upon the alienation by heirs of inherited lands allotted and deeded in the right of a member of the Osage Tribe of Indians after his death, save only the mineral interests therein, reserved to the Tribe, individual disposition of which is ex-

pressly inhibited, and in holding that the purpose of the Act of Congress of April 15, 1912, was not to impose restrictions upon alienation of Osage lands, but to authorize the conveyance of such of said lands to which restrictions had attached by reason of their allotment to living members of the Tribe, who had subsequently died, leaving surviving them Indian heirs, members of the Tribe, to whom certificates of competency were issued.

Prior to the division of the Osage Indian Reservation, the title thereto reposed in the Tribe in trust for its members, who occupied same under authority of the United States, without power of alienation. *Labadie* vs. *U. S.*, 51 Pac. 666, 6 Okla. 400.

U. S. vs. *Aaron et al.*, 183 Fed. 347..... 12

The Osage Allotment Act, imposing restrictions and providing how such lands could be sold, prohibited their sale in any other way.

Stevens vs. *Smith*, 10 Wall 321..... 13

Restrictions on Indian lands run with the land, not, however, to restrict a white man, not a member of the Tribe.

Goodrun vs. *Buffalo*, 162 Fed. 817.

Levindale Lead & Zinc Min. Co. vs. *Coleman*, 140 Pac. 607.

Same, 241 U. S. 432..... 13

The Osage Allotment Act imposed restrictions on inherited lands without reference to whether the allottee died before or after allotment 13

The Act of Congress of March 3, 1909, also imposed restrictions..... 17

3. The State Supreme Court erred in holding that the District Court of Osage County, Okla., had jurisdiction to partition the lands involed, and that its judgment was conclusive of the rights of the parties in this proceeding to share equally in the disposition of the lands in question.

The Court had no jurisdiction over the lands, except such as were given by Act of Congress.

McKay vs. *Kalyston*, 204 U. S. 458.

U. S. vs. *Richert*, 188 C. S. 432..... 17

U. S. ex rel. West vs. *Hitchcock*, 205 U. S. 80 18

This being restricted land, and the partition judgment being subject to review by the Secretary, the same was not judicial action and could not be *res adjudicata.*

U. S. vs. *Ferririo*, 18 How. 41, 14 Ed. L. 42.

Gordon vs. *U. S.*, 2 Wall. 561, 17 Ed. L. 921.

In Matter of Sambora, 148 U. S. 222, 37 L. Ed. 429.

S. Dakota vs. *S. Carolina*, 48 L. Ed. 461

LaAbra Silver Min. Co. vs. *U. S.*, 175 U. S. 455, 44 L. Ed. 234.

Dist. of Columbia vs. *Eslin*, 183 U. S. 62, 46 L. Ed. 85.

Cochran et al. vs. *Blank et al.*, 156 Pac. 324.

Hope vs. *Foley*, 157 Pac. 727.

Tiger et al. vs. *Creek Co.*, 146 Pac. 912.... 18

Nor did it have the finality making it *res adjudicata.*
Bigelow on Estoppel, 64, 65.

23 Cyc. 1128..... 18

Nor was it *res adjudicata* of the incidental question of heirship.

2 Black on Judgments, 611, 613..... 18

IN THE SUPREME COURT
OF THE UNITED STATES

JOHN KENNY,

Petitioner,

vs.

LABAN MILES AND JOHN L. BIRD, Administrators of the Estate of Lah-tah-sah, deceased, Osage Allottee, No. 256,

Respondents.

No _____

BRIEF OF PETITIONER,

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA.

STATEMENT.

This is a contest of heirs to the estate of a deceased Osage allottee. Lah-tah-sah, the deceased, was a full-blood Osage Indian woman, who died in Osage County, Oklahoma, where she had been allotted lands, without receiving a certificate of competency or having her restrictions removed. She left surviving her, the petitioner member of said Tribe in Oklahoma, who has not received a certificate of competency nor had his restrictions removed, and who claims to have been married to Lah-tah-sah before her death, and, as her surviving husband, an heir inheriting one-half of her estate.

This case had its inception in a probate proceeding in the County Court of Osage County, Oklahoma, by a petition for administration upon the estate of the deceased, signed by the said Laban Miles, asking the appointment of John L. Bird, the other respondent herein, as administrator, and, among other things, alleging:

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>
> Lands allotted to her, as a member of the Osage Tribe of Indians, in Osage County, Oklahoma, amounting to about 660 acres, of the approximate yearly rental value of $500, and Tribal Trust Funds belonging to her, as a member of said Tribe, and to her credit in the Treasury of the United States, together with oil, gas and other mineral annuities, of the approximate yearly income of $600."

Upon the appointment of such administrator, an appraisement was had and returned into that court, as authorized by the laws governing the procedure thereof, showing the real estate of the decedent to consist of the

> Northwest Quarter (NW¼) of Section 26, Township 24, Range 4, homestead; and the East Half (E½) of Section 30, Township 28, Range 9, containing 320 acres; Lot Three (3) East Half (E½) of the Southwest Quarter (SW¼) of Northwest Quarter (NW¼),Southeast Quarter (SE¼) of the Northwest Quarter (NW¼) of Section 4, Township 20, Range 10, containing 110.12 acres; North Half (N½) of Southeast Quarter (SE¼) of Section 4, Township 20, Range 10, containing 80 acres; all North and East of the Indian Meridian in Osage County, Oklahoma.

In the course of the administration, the administrator filed his final report, praying distribution of the estate and suggesting that the petitioner herein and the said Laban Miles were heirs of Lah-tah-sah and entitled to inherit equally. In reply thereto, the petitioner filed herein, who is her son and who is also a full-blood Osage Indian, an allottee and member of that Tribe in Oklahoma, who has not received a certificate of competency nor had his restrictions removed; and the respondent

Laban Miles is a full-blood Osage Indian and allottee and his objections to the claim of the said Laban Miles as such husband and heir, claiming to be the sole heir of the deceased and objecting to the distribution of any of such estate to the said Laban Miles. To this, the said Laban Miles filed his plea of *res adjudicata,* as set out in the petition herein, alleging, substantially, that by the previous judgment of the District Court of Osage County, rendered in April, 1913, in the partition action brought by Laban Miles against John Kenny, the issue of heirship and Miles' right to inherit had been adjudicated and was final.

The journal entry of judgment attached to such plea of *res adjudicata* showed that the deceased and Laban Miles were both full-blood Osage Indians, and described lands which the court judicially knew to be a part of the Osage Tribal lands which had been distributed by allotments, and that the said Lah-tah-sah was an Osage allottee, and contained the purported finding by the court, that these lands had been allotted and deed to Lah-tah-sah, and that Lah-tah-sah died intestate on or about the 19th day of August, 1908, leaving an estate consisting in part of lands, the description of which showed them to be the same lands as hereinbefore described in this brief; and such plea of *res adjudicata* failed to show that either of such Indians had received certificates of competency or had had their restrictions removed; or that the Honorable Secretary of the Interior had approved such partition judgment, as required by Section 6 of the Act of Congress, approved April 18, 1912, 37 Stat. L. 86, providing:

> "That from and after the approval of this Act, the lands of deceased Osage allottees, unless the heirs agree to partition the same, may be partitioned or sold upon proper order of any court of competent jurisdiction, in accordance with the laws of the State of Oklahoma; provided, that no partition or sale of the restricted land of a deceased Osage allottee shall be valid until approved by the Secretary of the Interior."

There being no contention that the heirs had ever consented to such partition, but the pleadings in the case showing that the petitioner resisted such. To this plea of *res adjudicata* of Laban Miles, the petitioner filed his demurrer, as alleged in the petition herein, which was overruled by the County Court and exceptions taken. Thereupon, petitioner filed his answer, as alleged in the petition herein, to which the said Laban Miles filed his motion to strike, as alleged in the petition herein, and the County Court, ruling thereon, struck out the second paragraph of said answer, to which petitioner excepted.

Trial being had in the County Court and judgment and decree being rendered against the petitioner, appeal therefrom was duly taken to, and a trial thereof *de novo* on both questions of law and fact demanded, in the District Court of Osage County.

In that manner the case came to the District Court of Osage County. Upon the trial of the case in the District Court of Osage County, that court overruled petitioner's demurrer to said plea of *res adjudicata,* to which petitioner excepted; and struck out paragraphs 2, 3-a, 3-b and 3-c of petitioner's answer to such plea of *res adjudicata,* to which ruling petitioner excepted; and admitted the said partition judgment, copy of which was attached to such plea of *res adjudicata,* and other incompetent testimony with respect thereto in the trial of the case in the District Court, over the objections of the petitioner and to which petitioner excepted; and rejected and excluded competent testimony offered by petitioner to answer and refute the issues of such plea of *res adjudicata,* to which petitioner excepted; all as set out in the petition herein and the record attached thereto. This, notwithstanding the petitioner proved in the trial in such district court that he and the said Lah-tah-sah and the said Laban Miles were all full-blood members of the Osage Tribe of Indians in Oklahoma, allottees of such Tribe, and that neither had received a certificate of competency or had their restrictions removed; and that he had not consented to the partition of such lands, and that the said judgment

in the partition action and the partition pleaded and offered in evidence had not been approved by the Honorable Secretary of the Interior.

It further appeared that the allotment deeds in the above case were signed by the principal chief, the homestead deed on September 23, 1908, and the ,deed conveying the surplus land on May 5, 1909.

Said District Court, holding that said judgment in the partition action previously rendered was *res adjudicata* of the same issues in such proceeding in administration, denied the petitioner the several rights especially set up by him, and rendered judgment and decree against him and in favor of the said Laban Miles, decreeing that the said Laban Miles was heir-at-law of said deceased and was entitled to inherit one-half her estate, and distributed one-half to him, to which petitioner objected. Thereupon. the petitioner duly appealed to the Supreme Court of the State of Oklahoma, which action was therein numbered 7708 and styled "John Kenny, Plaintiff in Error, vs. Laban Miles and John L. Bird, Administrator of the Estate of Lah-tah-sah, Osage Allottee No. 256, deceased, Defendants in Error," that being the highest court of the State in which a judgment or decision in said case could be rendered.

Upon the due presentation of such appeal to said State Supreme Court, upon the opinion of one of its Commissions, authorized by the state laws so to act and to prepare opinions, which was approved by the said Supreme Court, a copy of which opinion is contained in the transcript attached to the petition herein, said State Supreme Court, holding that said lands were selected in the right of Lah-tah-sah after her death, affirmed the judgment and decree of the District Court. The State Supreme Court considered the Act of Congress of June 28, 1906, the Osage Allotment Act, 34 Stat. L. 539, the Joint Resolution of Congress approved February 27, 1909, 35 Stat. L. 1167, the Act of Congress of March 3,

1909, 35 Stat. L. 778, and the Act of Congress of April 18, 1912, 37 Stat. L. 86, and held:

> "The Act of Congress of June 28, 1906, Chap. 572, 34 Stat. L. 539, placed no restrictions upon the alienation by heirs of inherited lands allotted and deeded in the right of a member of the Osage Tribe of Indians after his death, save only the mineral interests therein, reserved to the Tribe, individual disposition of which is expressly inhibited."

> "That the purpose of the Act of Congress of April 18, 1912, 34 Stat. L. 86, Chap. 83, was not to impose restrictions upon alienation of Osage lands, but to authorized the conveyance of said lands to which restrictions had attached by reason of their allotment to living members of the Tribe, who had subsequently died, leaving surviving them Indian heirs, members of the Tribe, to whom no certificates of competency were issued."

And, also:

> "That the District Court of Osage County had jurisdiction to partition the lands involved, and that its judgment was conclusive of the rights of the parties in this proceeding to share equally in the disposition of the lands in question."

The said State Supreme Court considered fully the federal questions involved, and denied petitioner the title, rights, privileges and immunities under such federal statutes especially set up and claimed by him:

> (a) In affirming the judgment overruling petitioner's demurrer to such plea of *res adjudicata.*

> (b) In affirming the judgment sustaining the ruling of the trial court, striking out the designated paragraphs of petitioner's answer.

> (c) In affirming the judgment of the trial court admitting incompetent evidence offered by said Laban Miles with respect to such plea of *res adjudicata.*

> (d) In affirming the judgment of the trial court rejecting and excluding competent testimony offered

by petitioner, that the said Laban Miles had not been married to and was not the husband or heir of the said decedent.

(e) In finding and holding that such lands had been selected in the right of the said Lah-tah-sah after her death; and in failing to find and hold that the said lands had been selected and allotted to the said Lah-tah-sah before her death, and that the said Laban Miles, because of the facts and admissions in the record and the theory of the proceeding, and upon which the case was tried below, was estopped to deny that the said lands were the lands, and the restricted lands, of the said deceased Osage allottee.

(f) In failing to find and to hold that the said lands involved were the restricted lands of a deceased Osage allottee, and that the judgment and proceedings pleaded as *res adjudicata*, not having been approved by the Honorable Secretary of the Interior, were invalid, and not decisive of any of the issues involved in such administration proceeding, and not evidence of the truth of any of its purported findings or recitals.

(g) In holding that the Act of Congress of June 28, 1906, Chap. 572, Stat. L. 539, placed no restrictions upon the alienation by heirs to inherited lands allotted and deeded in the right of a member of the Osage Tribe of Indians after his death, save only the mineral interest therein, reserved to the Tribe, individual disposition of which is expressly inhibited. And the said State Supreme Court erred in failing to find and to hold that the said Act of Congress did place restrictions upon said lands and the Act of Congress of March 3, 1909, 35 Stat. L. 778, imposed restrictions on such lands and continued previous restrictions thereon; and in failing to find and to hold that the Osage tribal lands in Oklahoma, of which these allotments were parts, were subject to restriction and held by the Tribe, and that such restrictions, under the legislation for the division of such lands among the members of such Tribe, continued until certificates of competency were issued to the allottee, or the same was sold under the rules and regulations and subject to the approval of the Honorable Secretary of the Interior.

(h) And in finding and in holding that the purpose of the Act of Congress of April 15, 1912, 37 Stat. L. 86, Chap. 83, was not to impose restrictions upon alienation of Osage lands, but to authorize the conveyance of such of said lands to which restrictions had attached by reason of their allotment to living members of the Tribe, who have subsequently died, leaving surviving them Indian heirs, members of the Tribe, to whom certificates of competency were issued; and said Supreme Court erred in not holding that the purpose of said Act of Congress was to restrict the partition of lands of the character herein involved subject to the approval of the Honorable Secretary of the Interior.

(i) And in holding that the District Court of Osage County had jurisdiction to partition the lands involved, that its judgment was conclusive of the rights of the parties in this proceeding to share equally in the disposition of the lands in question; and the said State Supreme Court erred in not holding that the said judgment of the District Court of Osage County, partitioning said lands, not being approved by the Honorable Secretary of the Interior, was invalid for any purpose whatever.

(j) In depriving petitioner of one-half of such trust funds and allotted lands by the use and means of such partition judgment, which was invalid and of no force for the purpose for which it was rendered.

(k) In giving force indirectly to such invalid judgment, when it was not enforceable directly.

(l) In depriving petitioner of the rights and privileges of the guardianship of the Government and the protection and supervision of the Honorable Secretary of the Interior with respect to such inherited Indian lands.

(m) In denying petitioner immunity from the operation and effect of said partition judgment until the same is approved by the Honorable Secretary of the Interior.

(n) In affirming the judgment of said District Court and denying petitioner a re-hearing therein and thereof.

ARGUMENT.

The errors hereinbefore mentioned, and the reasons urged for the issuance of the writ of certiorari, may be grouped under three distinct heads, following:

First. The erroneous view of the pleadings and of the facts taken by the trial court and the State Supreme Court, that because deeds were not issued until after the death of Lah-tah-sah, such lands were not selected or allotted to her until after her death. Under this heading may be included the reasons hereinbfeore designated "(a), (b), (c), (d), (e) and (f)." The judgment rendered by the District Court of Osage County in April, 1913, in the partition proceeding, and pleaded in the instant case as *res adjudicata*, showed that Lah-tah-sah and Laban Miles were both full-blood Osage Indians, that Lah-tah-sah was an allottee, that the lands were parts of the former Osage Indian Reservation, which was divided among the members of such Tribe, and that Lah-tah-sah died intestate, leaving an estate consisting in part of these lands. This clearly showed that the lands were the lands of a deceased Osage allottee, and should have been treated as Laban Miles' admission to that effect, and this plea of *res adjudicata* failing to show that Lah-tah-sah, or Laban Miles, or the petitioner, had received certificates of competency, or that the Honorable Secretary of the Interior had approved such judgment and proceeding, was clearly insufficient to conclude the petitioner with respect to the findings and recitals and decrees in such judgment, and the demurrer should have been sustained. However, the demurrer being overruled, and petitioner having answered, joining issue on such plea, that the lands involved were the restricted lands of a deceased Osage allottee, and that the said judgment and proceeding had not been approved by the Honorable Secretary of the Interior,

and that Laban Miles had not been married to and was not the husband or heir of the deceased, it was error to strike out the paragraphs of the answer tendering such issues.

The proceeding itself, being one instituted in the County Court of Osage County, Oklahoma, to administer the estate of the decedent, was based upon the conclusive assumption that these lands which has been taken into such administration were the lands of the decedent at the time of and before her death, else that court would have had no jurisdiction of the subject-matter, and in the inception of the administration proceeding Laban Miles had solemnly recited in the petition for the appointment of administrator that the general character and probable value of the estate left by the decedent was as follows:

> "Lands allotted to her, as a member of the Osage Tribe of Indians, in Osage County, Oklahoma, amounting to about 660 acres, of the approximate yearly rental value of $600, and Tribal Trust Funds belonging to her as a member of such Tribe, and to her credit in the Treasury of the United States, together with oil, gas and other mineral annuities of the approximate yearly income of $600;"

referring to these lands; and these same lands being appraised, and one tract designated as homestead, as part of the estate of the decedent, of which such County Court had jurisdiction, because Lah-tah-sah died seized of such estate, were conclusive admissions on the part of Laban Miles and the administrator, that these same lands had been selected and allotted to decedent in her lifetime.

These parts and the whole of the record show that the case was tried below on that theory, and that the Supreme Court, in finding that these lands were selected

after her death, did so without any testimony in the record to that effect, and in failing to find that they were not allotted to her in her lifetime, disregarded these solemn admissions, recitals and statements of the said Laban Miles and of the administrator, and decided the case upon a theory different from that upon which it had been tried. This, we submit, cannot properly be done. See Aaron et al. vs. United States, 204 Federal 943, in which the Circuit Court of Appeals of the Eighth Circuit held that the theory of a case could not be changed, that admissions made of the allotments of lands to Osage allottees in the trial of a case were conclusive upon the person making such admissions, and that it was immaterial that the deeds were not issued until after the death of the allottee. In that case the court held that the allotments were restricted. And we submit that this question arising in a probate proceeding in the County Court of Osage County, the appellate courts exercised like jurisdiction, and that the theory of such jurisdiction and the records and admissions hereinbefore recited, show conclusively that these lands were of the estate of Lah-tah-sah at the time of her death, and were her lands within the meaning of the Act of April 18, 1912, providing that partition thereof is invalid until approved by the Honorable Secretary of the Interior.

In the instant case the judgment in the partition proceeding had not been followed by an actual partition or sale of the lands, and the Secretary of the Interior had not approved any phase or part of such proceeding. Upon the state of the record the demurrer should have been sustained, and the motion to strike the issues tendered by the answer should have been overruled, and the petitioner should have been permitted to introduce his testimony showing that Laban Miles was not married to and was not

the husband or heir of the deceased. Besides, the court took an erroneous view of the law in concluding that if these lands had not been selected and allotted to the decedent before her death, that they would be unrestricted lands and not within the purpose of the Act of April 18, 1912. The discussion of this will be included under the next sub-head.

Second. The court took erroneous views of the law relative to the restrictive effect of the Osage Allotment Act of June 28, 1906, and the Act of March 3, 1906, supplementary thereto, and the Joint Resolution of Congress referred to above, in holding that they placed no restrictions upon the alienation by heirs of inherited lands, allotted and deeded in the right of a member of the Osage Tribe of Indians after her death; and that the Act of Congress of April 18, 1912, had no application thereto. Under this heading will be considered the reasons and errors hereinbefore designated as "(g)" and "(h)."

Prior to the division of the lands of the Osage Indians in Oklahoma, the Osage Tribe of Indians, having received conveyance of the Reservation from the Cherokee Nation, occupied the same under the authority of the United States, and were unable to convey any part of it without the authority of the Government. Labadie vs. United States, 51 Pac. 666, 6 Okla. 400. The Tribe, in relation to its members, was the repository of title in trust for them, without power to execute the trust in any respect without the authority and only according to limitations of Congressional legislation. U. S. vs. Aaron et al., 183 Federal 347. It follows that the Osage lands as such were subject to restrictions without the affirmative action of Congress at the time of the passage of the Allotment Act, and that any Congressional provision for their allotment and sale by individuals impliedly excluded their

sale in any other way, and no individual was authorized to sell without a certificate of competency.

Stephens vs. *Smith,* 10 Wall, 321, 19 L. Ed. 933;

And whatever restriction was on the land, however imposed, ran with the land and bound the heir as well as the allottee.

Goodrun vs. *Buffalo,* 162 Fed. 817.

Lovindale Lead & Zinc Mining Co. vs. *Coleman,* 140 Pac. 607, 43 Okla. 13.

This last decision was reversed by this court, reported in Lovindale Lead & Zinc Mining Co. et al. vs. Coleman, 241 U. S. 432, 60 L. Ed. 1080, on the ground that Coleman was a white man, not a member of the Osage Tribe of Indians, nor within the policy of Congress with respect to the protection of Indians, the court saying:

> "We confine ourselves to the single point presented. There is no controversy whatever as to the authority of the Secretary of the Interior, where there are undivided interests belonging to Indians, adequate to protect those interests according to the statutory provisions to this end. Our conclusion simply is that the Act of 1906 placed no restrictions upon the alienation of lands, or undivided interest in lands, of which white men who were not members of the Tribe became owners."

The first section of the Osage Allotment Act provided for preparation of the roll of the Tribe as it existed on the first day of January, 1906; and Section 2 provided, "that all lands belonging to the Osage Tribe of Indians in Oklahoma Territory, except as herein provided, shall be divided among the members of said Tribe, giving to each, his or her fair share thereof in acres, as follows:" This included Lah-tah-sah, and by virtue of that legislation she became entitled to her share of the tribal lands

within the limitations imposed by Congress. The next subdivision of Section 2 provides for the selection of the several allotments up to and including the third. Then the fourth sub-division of the same section provides:

> "Each member of the Tribe shall be permitted to designate which of his three selections shall be a homestead, and his certificate of allotment and deed shall designate the same as a homestead, and the same shall be inalienable and non-taxable until otherwise provided by Act of Congress. The other two selections of each member, together with his share of the remaining lands allotted to the member, shall be known as surplus land, and shall be inalienable for twenty-five years, except as hereinafter provided."

The seventh sub-division of the same section provides:

> "That the Secretary of the Interior, in his discretion, at the request and upon the petition of any adult member of the tribe, may issue to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded him by reason of this Act, except his homestead, which shall remain inalienable and non-taxable for a period of twenty-five years, or during the life of the homestead allottee, if upon investigation, consideration, and examination of the request he shall find any such member fully competent and capable of transacting his or her own business and caring for his or her own individual affairs: Provided, that upon the issuance of such certificate of competency the lands of such member (except his or her homestead) shall become subject to taxation, and such member, except as herein provided, shall have the right to manage, control and dispose of his or her lands the same as any citizen of the United States;"

then concluding with other provisions not relevant hereto.

It will be observed that this seventh sub-division provides how any land deeded an Indian under the provisions of this Act may be sold, which obviously includes any land acquired by the Indian under the provisions of the

Act, that is, homestead, surplus or residue land, or land inherited, whether allotted to his ancestor in her lifetime or not. Every part of the land formerly comprising the Osage Reservation, received in severalty by the members of that Tribe under the provisions of this Act, which included the lands in question here, without regard to the refinements which have been attempted, may be sold only after an investigation by the Secretary of the Interior and the issuance to such Indian of a certificate of competency. Under the holding in Stevens vs. Smith, *supra*, this section providing how the lands may be sold, impliedly excludes their sale in any other way.

Section six of the Act provides:

> "That the lands, moneys and mineral interests, herein provided for, of any deceased member of the Osage Tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or of the State in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys, and mineral interests must go to the mother and father equally."

And Section seven provides:

> "That the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided; and said members, or their heirs, shall have the right to use and to lease said lands for farming, grazing, or any other purpose not otherwise specifically provided for herein, and said members shall have full control of the same, including the proceeds thereof; provided, that parents of minor members of the tribe shall have the control and use of said minors' lands, together with the proceeds of the same, until said minors arrive at their majority; and provided further, that all leases given on said lands for the benefit of the individual members of the tribe entitled thereto, or for

their heirs, shall be subject only to the approval of the Secretary of the Interior."

These restricted tribal lands being divided among the members of the Tribe according to the roll as of January 1, 1906; and descending to their heirs for the use of such, with the requirement that the Secretary of the Interior approve leases thereon, without any indications of legislative distinction depending upon whether the ancestor died before or after allotment, so obviously bring the whole of such lands within the manifest policy of the legislation to protect the Indian members until the Secretary of the Interior shall find them competent to manage their own affairs, that speculative and strained analogies to the contrary should not be considered. Section six comprehends all classes of heirs, whether their ancestors died before or after allotment; and Section seven sets aside for the sole use and benefit of the individual members of the tribe entitled thereto, or their heirs, as therein provided, the lands coming within the scope of that legislation, which were all the lands of such Reservation, including the lands in controversy here. Here the Indian use is made prominent. It suggests that phase of rights long enjoyed by Indians in the occupancy of their lands, whether communal or in severalty, which did not include the right of alienation; and the fact that the Secretary of the Interior is required to approve leases, whether for the benefit of a member of the Tribe or for an heir, shows that the system of restriction imposed, while giving the Indian title to the land, left him without power of alienation as to any of such land, however acquired, under the terms of the Act, until the Secretary of the Interior should find him competent to manage his own affairs, and issue to him a certificate to that effect.

The Coleman case, *supra,* holding that Coleman, being a white man, did not come within this protective

policy, by its very care in distinguishing between the status of Coleman and an Indian heir, suggests the correctness of our contention.

The Act of March 3, 1909, provided:

> "That the Secretary of the Interior be and he hereby is authorized and empowered, upon application, to sell, under such rules and regulations as he may prescribe, part or all of the surplus lands of any member of the Kaw or Kansas and Osage Tribes of Indians in Oklahoma; provided, that the sales of the Osage lands shall be subject to the reserved rights of the Tribe in oil, gas and other minerals."

The word "member" here is obviously used to include any member of the Tribe holding such lands, either by allotment or inheritance. There is no legislative indication of distinction between the members holding by allotment and members holding through inheritance. The obvious purpose is to protect the Indians against being overreached by designing white men, and to put the duty of protection upon the Secretary of the Interior; and under the rule in Stevens vs. Smith, *supra,* this Act, providing how such lands may be sold, impliedly prohibits their sale in any other way. This legislation is unlike, in this respect, the legislation affecting the Five Civilized Tribes in Oklahoma, and the decisions under the Five Civilized Tribes legislation are inapplicable here.

Third. The court erred in holding that the District Court of Osage County had jurisdiction to partition the lands involved, and that its judgment was conclusive of the rights of the parties in this proceeding to share equally in the disposition of the lands in question; and under this heading we will consider reasons "(i)" to "(n)" inclusive.

Such court had no jurisdiction over these lands, except such as may have been given by Act of Congress.

McKay vs. *Halyston,* 204 U .S. 458, 51 L. Ed. 566.

U. S. vs. *Richert,* 188 U. S. 432, 47 L. Ed. 532.

U. S. ex rel. West, vs. *Hitchcock,* 205 U. S. 80, 51 L. Ed. 718.

And the only jurisdiction given such court being that to partition subject to the approval of the Secretary of the Interior, if these were restricted lands the findings as to the rights of heirs and the decree of partition were not judicial actions; but being subject to the review of the Secretary of the Interior, they were merely ministerial or administrative actions.

U. S. vs. *Ferrerio,* 18 How. 41, 14 L. Ed. 42.

Gordon vs. *U. S.,* 2 Wall, 561, 17 L. Ed. 921.

In the Matter of Sambora, 148 U. S. 222, 37 L. Ed. 429.

S. Dakota vs. *S. Carolina,* 48 L. Ed. 461.

La Abra Silver Min. Co. vs. *U. S.,* 175 U. S. 455, 44 L. Ed. 234.

Dist. of Columbia vs. *Eslin,* 183 U. S. 62, 46 L. Ed. 85.

Cochran et al. vs. *Blank et al.,* 156 Pac. 324.

Hope vs. *Foley,* 157 Pac. 727.

Tiger et al. vs. *Creek County,* 146 Pac. 912.

And not being judicial action it could not be *res adjudicata* of the issues it attempted to determine, else one could be concluded in his rights without his consent and without his day in court. Nor did it have the finality giving it the force of *res adjudicata.*

Bigelow on Estoppel, 64, 65.

23 Cyc. 1128.

And not being valid as to the subject-matter with respect to which the jurisdiction was conferred, the partition of the land, it would not be valid as to the incidental question of heirship which it attempted to settle.

2 Black on Judgments, 611, 613.

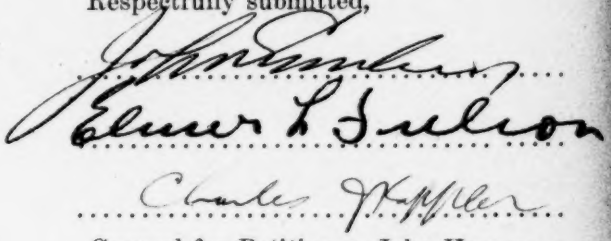
If this partition judgment required, for its validity, the approval of the Secretary of the Interior, it would logically follow that the incidental determination of heirship would have no validity without such approval, else it would accomplish indirectly, by being used in an administration proceeding, what Congress expressly provided against without the Secretary's approval.

In conclusion, the petitioner was denied the right to refute the issues which took from him one-half of this estate by a judgment not approved by the Secretary of the Interior and having no validity until it was so approved; and these rights, title, privileges and immunities taken from him, were given him under, and protected by, statutes of the United States. If it be suggested that petitioner had one trial of his rights in the action to partition the lands, and that the issues were found against him, we reply that Congress, for reasons it considered sufficient, placed this class of Osage Indians under the protection of the Secretary of the Interior; and notwithstanding the findings and judgment for the partition of this land, the Honorable Secretary of the Interior has never seen fit to approve it; and if the result was so inequitable and unfair that the Secretary would not approve it, it certainly follows that the petitioner should have had the right, in the administration proceeding, to a fair trial of these issues, and especially so since, as we submit, the law gave him the right thereto.

The State Supreme Court, in the decision in this case, laid down rules of law necessarily affecting many like cases and much of the lands allotted to Osage Indians and involving the rights of a great many of such Indians, and the decision in the Coleman case, *supra,* by this court, not having affirmatively decided the issues involved

herein, and so affecting so many of the Osages, we submit that this case is of that public interest and importance and this petitioner's contentions have that merit that the writ of certiorari should issue in this case.

Respectfully submitted,



Counsel for Petitioner, John Kenny.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

JOHN KENNY, PETITIONER,
v.
LABAN MILES AND JOHN L. BIRD, administrator of the estate of Lah-tah-sah, deceased. } No. 1093.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

SUGGESTIONS OF THE UNITED STATES IN SUPPORT OF THE PETITION.

(The opinion of the Supreme Court of Oklahoma will be found in the record at page 126 and in volume 162 of the Pacific Reporter at page 775.)

STATEMENT OF FACTS.

The petition of John Kenny seeks to bring up for review a judgment of the Supreme Court of the State of Oklahoma affirming a judgment of the District Court of Osage County in that State ordering a partition of the lands patented to a deceased member of the Osage Tribe of Indians under the act of Congress approved June 28, 1906, 34 Stat. 539.

The facts necessary to a consideration of the petition may be briefly stated as follows: Lah-tah-sah, a female full-blood member of the Osage Tribe of

Indians, died on or about August 19, 1908 (R. 4, 49), having received an allotment of lands, but no certificate of competency had been issued to her, nor had the restrictions on the alienation of her lands been removed (R. 46). Allotment deeds or patents were thereafter issued to her, the deed conveying her homestead having been executed September 23, 1908, and the deed conveying the surplus land, or all in excess of the homestead, on May 5, 1909. These deeds were approved by the Secretary of the Interior February 20, and July 30, 1909 (R. 67, 69). The allottee was survived by her son, the petitioner herein, who is likewise a full-blood member of the Osage Tribe; and also Laban Miles, one of the respondents, himself a full-blood Osage Indian, and who claimed to be the surviving husband of Lah-tah-sah. Neither Kenny nor Miles had received a certificate of competency.

On February 28, 1912, Miles instituted an action in the District Court of Osage County to effect a partition of the lands allotted to Lah-tah-sah, alleging that he was her surviving husband and that he and Kenny, the latter being the only child of the allottee, each succeeded to an undivided one-half of the lands allotted and patented in her name. To this petition Kenny filed an answer and cross-petition, averring that he was the only heir of the decedent and the sole owner of the lands in question, and, as such, entitled to the exclusive possession thereof; that the claim of Miles constituted a cloud upon his title and he prayed for relief accordingly. The

question involved in that case was the marriage of Miles to the allottee, which the court, after hearing evidence, determined in favor of Miles, ordered a partition of the lands and appointed commissioners for that purpose (R. 49–54).

While that case was pending Miles filed a petition in the county, or probate, court asking the appointment of John L. Bird, the other respondent herein, as administrator of the estate (R. 4). This was done, and the administrator thereafter filed a final account and asked that the heirs be determined, and that he be allowed to make a distribution of the lands and the income derived therefrom (R. 13). Kenny appeared in that proceeding, asserting that he was the sole heir of the allottee and entitled to the entire estate, whereupon Miles responded, claiming that that question was *res adjudicata*, as it had been tried and finally determined by the District Court of Osage County in the partition action that he had instituted on February 28, 1912, wherein it had been adjudged that he was entitled to a half interest in the distribution of the lands and proceeds. To this plea of *res adjudicata* Kenny demurred. The demurrer was overruled, and upon hearing the property was ordered distributed equally between him and Miles (R. 14–22).

An appeal was taken from the county court to the District Court of Osage County, where the action of the lower court was affirmed. A further appeal was taken to the Supreme Court of the State, where the judgment now sought to be reviewed was entered. The Supreme Court held that the act of 1906,

supra, placed no restrictions upon alienation by heirs of inherited lands allotted and deeded in the right of a member of the Osage Tribe after his death, and that the evident purpose of the act of April 18, 1912, 37 Stat. 86, was not to impose restrictions upon alienation of Osage lands, but, on the contrary, to authorize the conveyance of those lands allotted to living members of the tribe who had subsequently died leaving surviving them Indian heirs, members of the tribe, to whom certificates of competency had been issued.

THE LAW INVOLVED.

Prior to their allotment the lands in question were Indian lands and there is no doubt as to the power of Congress to impose restrictions upon alienation in providing for their allotment in severalty. The allotments were made under the act of June 28, 1906, *supra*, and to that act, therefore, and subsequent legislation on the subject, we must look to determine this question.

The provisions of that act were fully reviewed by this court in its somewhat recent decision in *Levindale Lead and Zinc Mining Co.* v. *Coleman*, 241 U. S. 432, and it will be sufficient therefore to make only a brief reference to those provisions which are regarded as directly in point.

The lands were to be divided among members of the tribe, giving to each his fair share, each member being allowed to make three selections of 160 acres each (sec. 2). Each member of the tribe was authorized to designate which of his three selections should

be a homestead, and his certificate of allotment and the deed issued thereon should designate the same as a homestead, and the same was to be inalienable and non-taxable until otherwise provided by act of Congress. The two other selections of each member were to be known as surplus lands and made inalienable for 25 years, except as otherwise provided (sec. 2, par. 4). Section 6 provided that the lands, moneys, and mineral interests of any deceased member of the tribe should descend to his or her legal heirs, according to the laws of the Territory of Oklahoma or the State in which the lands might be thereafter incorporated, except that where the decedent left no issue, nor husband nor wife, the lands, moneys, and mineral interests should descend to the mother and father equally.

Section 7 provided that the lands allotted were to be set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or their heirs, and that said members or their heirs should have the right to use and lease the lands for farming, grazing, or any other purpose not otherwise specifically provided for, there being a proviso to the effect that all leases given on lands for the benefit of the individual members of the tribe or for their heirs should be subject only to the approval of the Secretary of the Interior.

Deeds for these lands were to be executed by the principal chief of the tribe, but were not to be valid until approved by the Secretary of the Interior (sec. 8), and there was a further provision to the effect that whatever was necessary to carry out the

provisions of the act should be done under the authority of the Secretary of the Interior.

The act of April 18, 1912, *supra*, is supplementary to, and amendatory of, the act of 1906 and provides, among other things, that the property of deceased and of orphan minor, insane, or other incompetent allottees of the Osage Tribe shall, in probate matters, be subject to the jurisdiction of the county courts of the State of Oklahoma; and no land is to be sold or alienated under the provisions of this section (3) without the approval of the Secretary of the Interior.

Section 6 of that act provides (37 Stat. 87):

> That from and after the approval of this act the lands of deceased Osage allottees, unless the heirs agree to partition the same, may be partitioned or sold upon proper order of any court of competent jurisdiction in accordance with the laws of the State of Oklahoma: *Provided*, That no partition or sale of the restricted lands of a deceased Osage allottee shall be valid until approved by the Secretary of the Interior. Where some of the heirs are minors, the said court shall appoint a guardian ad litem for said minors in the matter of said partition, and partition of said land shall be valid when approved by the court and the Secretary of the Interior. When the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed. If some of the heirs are competent and others have not certificates of competency,

the proceeds of such part of the sale as the competent heirs shall be entitled to shall be paid to them without the intervention of an administrator. The shares due minor heirs, including such minor Indian heirs as may not be tribal members and those Indian heirs not having certificates of competency, shall be paid into the Treasury of the United States and placed to the credit of the Indians upon the same conditions as attach to segregated shares of the Osage national fund, or with the approval of the Secretary of the Interior paid to the duly appointed guardian. The same disposition as herein provided for with reference to the proceeds of inherited lands sold shall be made of the money in the Treasury of the United States to the credit of deceased Osage allottees.

THE FEDERAL QUESTION INVOLVED.

From the foregoing it will be readily seen that the Federal question decided by the State Supreme Court was whether the land in controversy was subject to restrictions on alienation imposed by acts of Congress, and the court decided that question adversely to the petitioner herein who claimed its benefit. The Supreme Court did not decide as to the capacity in which the District Court of Osage County would have acted and the consequent conclusiveness of its judgment in the event it had been held that the lands in question were restricted lands, but, on the contrary, expressly found that to be unnecessary, holding, as stated, that the lands were free from restrictions

and that the District Court of Osage County had jurisdiction to partition them and its judgment was conclusive of the rights of the parties.

It has been settled by this court that the restrictions on alienation of Osage Indian lands imposed by the act of 1906 and recognized or imposed by the act of April 18, 1912, do not necessarily run with the land, but are rather intended for the protection of the incompetent members of the tribe; and hence where lands allotted to an incompetent Indian descend to a white man, one of the allottee's heirs, such lands are no longer subject to any restrictions on alienation. *Levindale Lead and Zinc Mining Co.* v *Coleman*, 241 U. S. 432.

While the question here in controversy was not involved in the case cited, the court clearly indicated its views upon the subject by the use of the following language (p. 440):

> * * * There is no controversy whatever as to the authority of the Secretary of the Interior, where there are undivided interests belonging to Indians, adequately to protect those interests according to the statutory provisions to this end. Our conclusion simply is that the act of 1906 placed no restrictions upon the alienation of land, or undivided interests in land, of which white men who were not members of the tribe became owners.

The contention of the respondents that the restrictions on alienation imposed by the act of 1906 applied only to lands allotted to living members is not only inconsistent with the evident purpose of the act, but

is flatly contradicted by that provision in section 7 which declares that leases given for the benefit of individual members "or their heirs" shall be subject to the approval of the Secretary of the Interior; it is also in direct conflict with that provision of section 6 of the supplementary act of 1912, which declares that—

> * * * When the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed.

If these lands were restricted, as we believe they were, a partition of them by the State courts would be effective only when approved by the Secretary of the Interior as provided in section 6 of the act of 1912, and the judgment of the State Supreme Court holding that the district court had complete jurisdiction to partition the lands was therefore erroneous.

We are advised that the decision in this case will control the disposition of many allotments held by incompetent members of the Osage Tribe of Indians, and we respectfully submit that the petition for certiorari should be granted.

JOHN W. DAVIS,
Solicitor General.

S. W. WILLIAMS,
Attorney.

MAY, 1917.

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No. 1[redacted]178

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1918

John Kenny,
Petitioner,

vs.

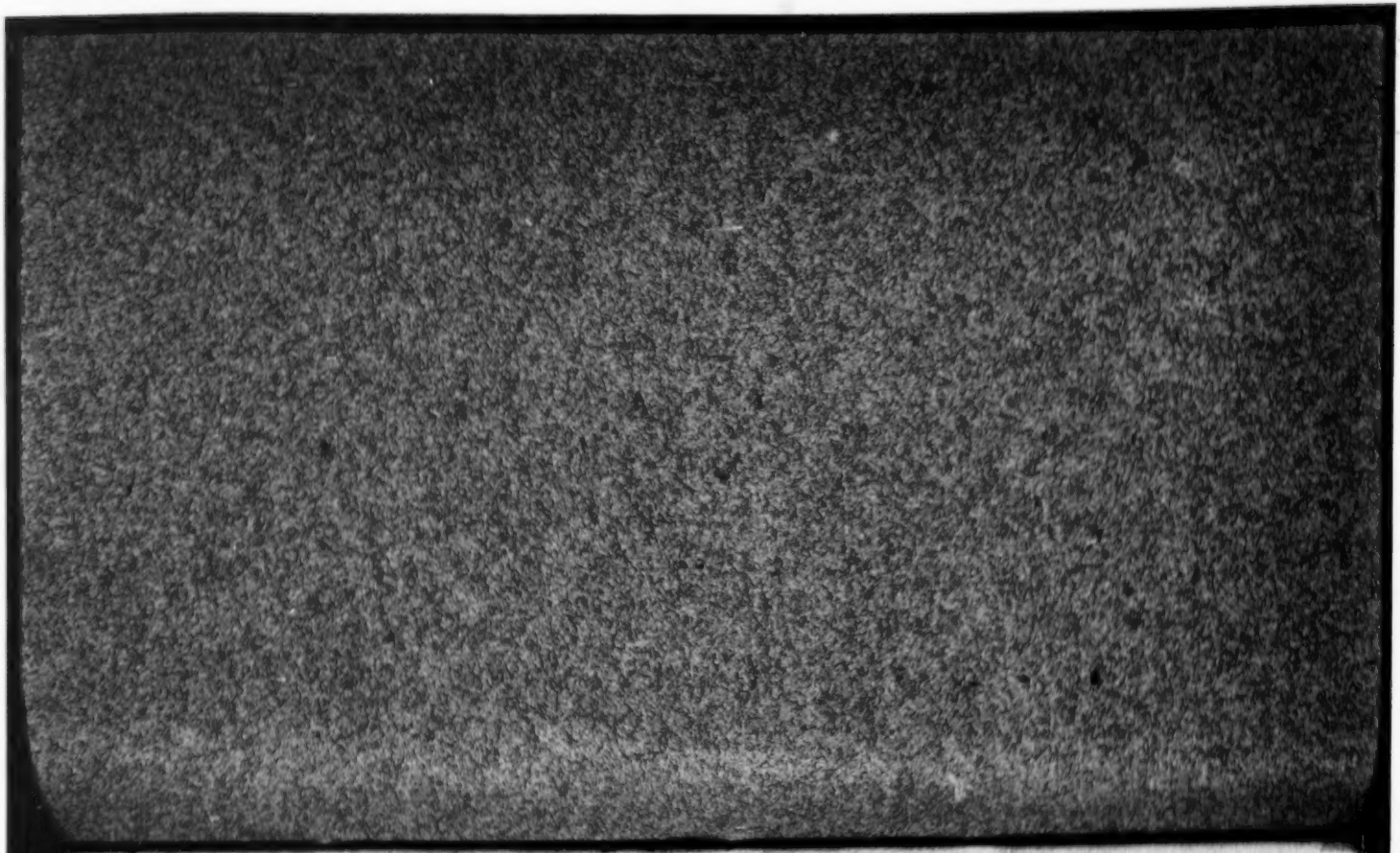
Laban Miles and John L. Bird, Administrator of the Estate of Lah-tah-sah, a deceased member of the Osage Tribe of Indians, Roll No. 256,
Respondents.

No.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

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INDEX

		Page
STATEMENT		1-10
Finding of fact and conclusions of law in partition judgment	25- 28	1- 3
Objections of petitioner to final account of administrator	22	3
Plea of Res Adjudicata	23- 28	3- 4
..Judgment in Partition Suit	25- 28	3- 4
Conclusions of Law in Partition Suit	27- 28	6
Judgment of County or Probate Court	36- 37	8
Notice of appeal on both questions of law and fact from County Court to District Court of Osage County	43- 46	9
Judgment of District Court on Appeal from County Court	117-120	9-10
BRIEF AND ARGUMENT		11-21
No Federal Question Involved		11
Question involved and litigated was whether Laban Miles was the surviving husband of Lah-tah-sah, deceased, and thereby an heir		11
Law of Descent, Sec. 6895 Wilson Stat.		11
Same made applicable to members of Osage Tribe of Indians by Sec. 6 of Osage Division Act		11
Question of State Law		11-12

Whether lands allotted before or after death of Lah-tah-sah immaterial 12

Whether parties full-bloods or mixed bloods or competent or incompetent immaterial.. 12-13

Whether Laban Miles is surviving husband of Lah-tah-sah not a federal question.. .. 13

Same, question of fact under state law applicabe to the facts 13-14

Questions of fact not reviewed by Federal Supreme Court 14

Only right claimed by petitioner..... 15

Decision of State Court plainly right writ will not issue 15

Sections of Oklahoma statute on partition... 15-16

Cases where Oklahoma District Court has determined heirs, affirmed by Federal Supreme Court 16-17

Same—Other Oklahoma Cases 17-18

Judgment of District Court in partition suit is a final judgment and may be appealed from 19

The judgment pleaded as *res adjudicata* not subject to approval by Secretary of the Interior, and same was never submitted for approval 19-21

CONCLUSION 21

TABLE OF CASES CITED

PAGES

Barnett vs. Way, 29 Okl. 780, 119 Pac. 418.....17

Bilby vs. Brown, 34 Okl. 738, 126 Pac. 1024.....17

Brady vs. Sizemore, 33 Okl. 169, 124 Pac. 615 (Affirmed in 235 U. S. 441, 59 L. Ed. 308.....17

Bruner vs. Sanders, 26 Okl. 676, 110 Pac. 730.....18

Buck vs. Branson, 34 Okl. 807, 127 Pac. 436.....18

California Powder Works vs. Davis, 151 U. S. 389, 38 L. Ed. 206 14

Chappell vs. Bradshaw, 128 U. S. 132, 32 L. Ed. 369.....14

Coachman vs. Sims, 36 Okl. 536, 129 Pac. 845.....17

Cyr vs. Walker, 28 Okl. 281, 116 Pac. 931.....18

Clarkson vs. Washington, 38 Okl. 4, 131 Pac. 935.....18

DeGraffenreid vs. Iowa Land & Trust Co., 20 Okl. 687, 95 Pac. 624 17

Divine vs. Harmon, 30 Okl. 820, 121 Pac. 219.....17

French vs. Hopkins, 124 U. S. 524, 31 L. Ed. 536.....14

Fearnow vs. Jones, 34 Okl. 694, 126 Pac. 1015.....18

Giles vs. Little, 134 U. S. 645, 33 L. Ed. 1062.....13

Ground vs. Dingman, 33 Okl. 760, 127 Pac. 1078.....18

Hill vs. Hill, — Okl. —, 160 Pac. 1116.....17

Hooks vs. Kennard, 28 Okl. 457, 114 Pac. 744.....18

Irving vs. Diamond, 100 Pac. 557, 23 Okl. 325.....17

King vs. West Va., 216 U. S. 92, 54 L. Ed. 396.....14

Leeper vs. Texas, 139 U. S. 462, 35 L. Ed. 225.....14

Lamb vs. Baker, 27 Okl. 739, 117 Pac. 189.....18

McDougal vs. McKay, 43 Okl. 261, 142 Pac. 987, affirmed in 237 U. S. 372, 59 L. Ed. 1001 18

Morley vs. Fewell, 22 Okl. 452, 122 Pac. 700 18

Oxley Stave Co. vs. Butler Co., 166 U. S. 648, 41 L. Ed. 1149 14

Parker vs. McClain, 237 U. S. 469, 59 L. Ed. 1051.....15

Pigeon vs. Buck, 38 Okl. 101, 131 Pac. 1983, and Roberts vs. Underwood, 38 Okl. 376, 132 Pac. 673, con. and affd. in 237 U. S. 386, 59 L. Ed. 1007 18

Roth vs. Ehman et al., 17 Otto 319, 27 L. Ed. 499.....13
Reynolds vs. Fewell, 34 Okl. 112, 124 Pac. 623.....18

Spies vs. Illinois, 123 U. S. 131, 3 L. Ed. 80.....14

Spies vs. Illinois, 123 U. S. 574, 28 L. Ed. 1084.....15

Shellenberger vs. Fewell, 34 Okl. 79, 124 Pac. 117.....18

Texas & P. R. Co. vs. Southern P. Co., 137 U. S. 48, 34 L. Ed. 614 14

Telleride Power Trans. Co. vs. Rio Grande Western R. Co., 187 U. S. 659, 47 L. Ed. 307.....15

Waters Pierce Oil Co. vs. Texas, 212 U. S. 159, 43 L. Ed. 77 14

Washington vs. Miller, 34 Okl. 259, 129 Pac. 58, affirmed in Washington vs. Miller, 235 U. S. 422, 59 L. Ed. 295..17

Woodward vs. DeGraffenreid, 36 Okl. 81, 121 Pac. 162, Affirmed in 238 U. S. 284, 59 L. Ed. 1310.....17

Warren vs. Canard, 30 Okl. 514, 120 Pac. 599.....18

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1916

John Kenny,
Petitioner,

vs.

Laban Miles and John L. Bird, Administrator of the Estate of Lah-tah-sah, a deceased member of the Osage Tribe of Indians, Roll No. 256,
Respondents.

No.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

STATEMENT.

Lah-tah-sah was an Osage Indian woman, whose name was placed on the approved roll of the legal membership of the Osage tribe of Indians opposite the No. 256, when the roll of the legal membership of said tribe was made up, under the provision of the Act of Congress, approved June 28,

1906 (34 St. L. 539). Said Lah-tah-sah died, intestate, on the 19th day of August, 1908, before receiving a distributive share of the tribal property under said Act of Congress, which she would have been entitled to receive had she lived until distribution was made. Upon her death her right to participate in the division and distribution of the tribal properties passed, by descent, to her legal heirs, and after her death deeds conveying the lands involved, were executed in her name, as grantee, approved by the Secretary of the Interior, and recorded in the office of the Register of Deeds of Osage County, Oklahoma. These lands descended to her heirs, according to the laws of the State of Oklahoma, put in force by Section 6 of the Act of Congress, *supra.*

On February 28, 1913, respondent, Laban Miles, began an action in the District Court of Osage County, Oklahoma, to effect a partition of said land, alleging that he was the surviving husband and the petitioner, John Kenny, the only child of said Lah-tah-sah, Roll No. 256, and that upon her death, each succeeded to an undivided one-half of the lands allotted and deeded in her name; to this petition John Kenny filed his answer and cross petition, averring that he was the only heir of the said Lah-tah-sah, by reason whereof he was the sole owner of the lands involved; that he was in the constructive possession of said lands and entitled to the exclusive, actual possession thereof; that the claim of Laban Miles constituted a cloud upon his title and prayed that he be adjudged to be the sole owner of said lands, and entitled to immediate and exclusive possession thereof, and that the title in and to the said described lands be quieted in him. Said John Kenny sought to establish that his mother, Lah-tah-sah, was never married to said Laban Miles, by reason whereof Laban Miles was not an heir of her estate. The court, after hearing the evidence of many witnesses, made findings of fact and conclusions of law and rendered a judgment adjudging that Laban Miles and said Lah-tah-sah were duly and legally married, and thereafter lived together as

husband and wife, until the death of said Lah-tah-sah, a period of eleven months (Certified Rec. 25-28).

Meanwhile the respondent, John L. Bird, had been appointed administrator of the estate of said Lah-tah-sah, deceased, and on January 28, 1914, filed his final account in the Probate Court, alleging the heirs to be Laban Miles, surviving husband, and John Kenny, a son, each entitled to one-half of said estate; thereafter, on the 28th day of February, 1914, said John Kenny filed his objections and exceptions to said final account, as follows:

"Comes now John Kenny, son of the decedent, and alleges that he is the sole and only heir at law of said Lah-tah-sah; that he is the son of such decedent; that Laban Miles is not an heir of said decedent, and this said John Kenny objects and excepts to the final report of the administrator herein in that said report suggests that Laban Miles is an heir of such decedent, when in truth and in fact he is not.

"Wherefore, the said John Kenny prays that this court inquire, ascertain, and determine that the said Laban Miles is not an heir and has no interest in said estate; and that said John Kenny is the sole and only heir and that the whole of said estate be distributed to him and that said report be amended accordingly" (Certified Rec. 22).

To the objections and exceptions of said John Kenny the said Laban Miles filed a Plea of Res Adjudicata, as follows:

"Plea of Res Adjudicata (Certified Rec. 23-28).

"Comes now Laban Miles and alleges and states that on the 25th day of April, 1913, the District Court of Osage County, Oklahoma, rendered a judgment in the case of Laban Miles, plaintiff, versus John Kenny, defendant, in case No. 1896 in said court, by which judgment the heirs of the estate of Lah-tah-sah, Osage Allottee No. 256, deceased, were ascertained and determined. A copy of said judgment is hereto attached, marked 'Exhibit A' and made a part hereof; that in said judgment the validity of the marriage of said Laban Miles and said Lah-tah-sah, deceased, was ad-

judicated; that the time during which an appeal might have been taken from said judgment of the District Court has long since expired; that no appeal from said judgment has been taken; that said John Kenny appeared in person and by Hargis & Conwell, his attorneys, at the trial in the above entitled cause wherein said judgment was rendered and participated in the trial thereof, which said trial extended over a period of five days and many witnesses were called by each of the respective parties, and much evidence offered and submitted by the respective parties upon which said judgment was based and rendered. That said Laban Miles and John Kenny are the only parties claiming any interest in said estate. That the subject-matter involved in the District Court judgment was the same that is herein involved as relating to the validity of marriage and determination of ownership; that on Sept. 12, 1908, M. L. Garrett was appointed administrator of the estate of said Lah-tah-sah, deceased, and fully administered upon the estate, paid all debts and was discharged as such administrator on April 5, 1910.

"By reason whereof said Laban Miles alleges that the matter of the determination of the legal heirs of said Lah-tah-sah, deceased, has been fully adjudicated and all matters and claims relating thereto have become and are res adjudicata, and said Laban Miles pleads the same as a bar to the res adjudication thereof by this court and alleges that this court has no jurisdiction thereof.

Exhibit A.

"In the District Court in and for Osage County, Oklahoma.
"No. 1896. Laban Miles, Plaintiff, vs. John Kenny, Defendant.

"JOURNAL ENTRY (Certified Rec. 25-28).

"On the 25th day of April, 1913, same being a regular judicial day of the March, 1913, term of said court, the above entitled cause came on for hearing in its regular order, pursuant to agreement of the parties, before R. B. Boone, special judge agreed upon by the parties.

"The plaintiff appearing in his own proper person and by White & Widdows, his attorneys, and the defendant appearing in his own proper person and by Hargis & Conwell, his attorneys, and all parties waiving trial by jury, announced ready for trial by the court. And thereupon the plaintiff began introduction of his testimony and said cause was on trial in said court before said special judge, all parties being present in their own proper persons and by their attorneys, as hereinabove set forth on the 25th and 26th days of April, 1913, and on the 26th day of April the trial was adjourned to the 29th day of April, 1913, at noon, at which time said trial was resumed before said special judge, all parties being present in their own proper persons and by their attorneys, and continued on trial from noon of April 29th to May 2nd, inclusive, during which time the plaintiff introduced his testimony and rested, and thereupon the plaintiff offered his testimony in rebuttal and rested. And the court, after examination of the pleadings and hearing the arguments of Counsel in behalf of the respective parties, took the case under advisement pursuant to consent and agreement of counsel of the respective parties and stipulation of counsel for both parties filed in said cause; and

"Now, on this 24th day of May, 1913, after due consideration of all the evidence and arguments of counsel and being fully advised in the premises, the court finds the following facts:

"That in September, 1907, the plaintiff, Laban Miles, after having been divorced from his former wife, Wah-shah, she-me-tsa-he, according to Osage Indian customs, entered into an agreement with Lah-tah-sah whereby he and Lah-tah-sah agreed to become man and wife. That both were full-blood members of the Osage Indian Tribe and unmarried at the time. That they thereupon assumed the marriage relation and continued to sustain that relation up to the time of Lah-tah-sah's death on August, 19th, 1908, a period of eleven months. That the morning after they assumed such relationship, the defendant, John Kenny, the son of Lah-tah-sah

by a former husband, received a horse given away by Hluah-wah-tah, the brother-in-law of plaintiff, Laban Miles, in honor of the marriage of Laban Miles and Lah-tah-sah, in accordance with Osage Indinan custom, which horse defendant sold, appropriating the money to his own use. That on said morning other presents were given in accordance with the custom of Osage Indians at the marirage of Indians of the age of Laban Miles and Lah-tah-sah, and who had been theretofore married. That a feast was given in honor of said marriage on the morning after Laban Miles brought Lah-tah-sah to his home, but neither Laban Miles nor Lah-tah-sah were at said feast. That Laban Miles and Lah-tah-sah went to the Osage Indian Agent and had themselves enrolled as man and wife and a trading card was issued to Laban Miles on his own and Lah-tah-sah's quarterly annuities and payments.

"That Laban Miles and Lah-tah-sah were recognized by the Indians with whom they associated as man and wife until Lah-tah-sah's death. They were also so recognized during this time by the Osage Indian Agency and the Interior Department. That after assuming said relationship in September, 1907, they signed various papers to borrow money as man and wife, and held themselves out as such and were so recognized by those who dealt with them in a business way.

"Conclusions of Law.

"That plaintiff, Laban Miles, and Lah-tah-sah, Osage Allottee No. 256, were husband and wife at the time of the death of said Lah-tah-sah; that plaintiff, Laban Miles, is the surviving husband of said Lah-tah-sah, and as such is the owner of an undivided one-half interest in and to the lands described in plaintiff's petition.

"The court further finds that Lah-tah-sah, Osage Allottee No. 256, died intestate on or about the 19th day of August, 1908, leaving an estate consisting in part of the lands described in plaintiff's petition.

"The court further finds that the plaintiff, Laban Miles, and defendant, John Kenny above named are the only heirs at law of said Lah-tah-sah, deceased, and as such plaintiff Laban Miles owns an undivided one-half interest in and to the lands allotted and deeded to said Lah-tah-sah, described in plaintiff's petition, to-wit:

"NW¼ of Section 36, Township 24, Range 4, NE¼ of Section 30, Township 28, Range 9, SE¼ of Section 30, Township 28, Range 9; Lot 3, E½ of SW¼ NW¼, SE¼ of NW¼, N½ of SE¼ of Section 4, Township 20, Range 10, all north and east of the Indian Base and Meridian in Osage County Oklahoma.

"The court further finds that no part of the lands described was ever used, occupied or claimed by said Lah-tah-sah, deceased, or any of the parties to this action as a homestead, and that no part of same was the homestead of said Lah-tah-sah, or any party to this action. The court further finds that the parties hereto have been unable to agree upon a partition or division of said lands

"It is therefore ordered, adjudged and decreed by the court that the plaintiff, Laban Miles, and the defendant, John Kenny, are the owners in common of the lands described, and their respective interests and ownership herein is as follows:

"Laban Miles, plaintiff, Osage Allottee No. 507, an undivided one-half; John Kenny, defendant, Osage Allottee No. 2857, an undivided one-half; and that the shares of the aforesaid parties and their respective interest in the lands above described as above set forth, be and the same are hereby confirmed. It is further ordered, adjudged and decreed by the court that partition of said lands be made accordingly; that W. T. Mosier, J. W. Soderstrom and W. E. Savage are hereby appointed commissioners to make partition of said property among the parties according to their respective interests as herein fixed and determined, if such partition can be made without manifest injury. But if such partition can

not be made, the commissioners herein named shall make a valuation and appraisement of the property herein described anl make a report of their proceedings to the court."

After hearing the evidence, the probate court, upon the hearing of the final account of the administrator, rendered the following judgment (Certified Rec. 36-37).

"Now, on this 14th day of March, 1914, the above entitled matter coming on for hearing before Chas. R. Gray, special judge, pursuant to continuance as per Journal Entry in said matter made and rendered on the 28th day of February, 1914, claimant, Laban Miles, appearing by White & Widdows, his attorneys, and claimant, John Kenny, appearing by John Embry and A. S. Sands, his attorneys, and further appearing in his own proper person, and the court having heard the evidence and the arguments of counsel, and being fully advised in the premises finds:

"That the final account rendered by John L. Bird, administrator of the estate of said Lah-tah-sah, deceased, is true and correct, that said administrator has made no profit out of said estate and has made disbursements as stated in accounts, and statement of disbursements since rendition of said final account, and that said disbursements should be approved.

"The court further finds that the administrator is entitled to the sum of $12.00 as commission on amount of money belonging to said estate received and accounted for by said administrator.

"The court further finds from the evidence that the sole and only heirs of said Lah-tah-sah, deceased, are Laban Miles, surviving husband, and John Kenny, the only issue of said Lah-tah-sah, deceased, and that upon her death the entire estate of said Lah-tah-sah, deceased, descended in equal shares to said Laban Miles and John Kenny, to-wit: An undivided one-half to each.

"It is therefore ordered, adjudged and decreed by the

court that the final account of John L. Bird, administrator of said estate, be, and the same hereby is, by the court approved, and that said John L. Bird deduct from the money in his hands, belonging to said estate, the sum of $12.00 as compensation for services rendered as administrator in said estate, and file a receipt therefor, in this court; that said administrator pay the court costs now due and unpaid, out of the money in his hands, belonging to said estate, and file receipt therefor in this court.

"It is further ordered, adjudged and decreed by the court that the sole and only heirs of Lah-tah-sah, deceased, are Laban Miles, surviving husband, and said John Kenny, the only issue of said Lah-tah-sah, deceased; that upon the death of said Lah-tah-sah, deceased, her entire estate descended in equal shares to said Laban Miles and said John Kenny, to-wit, an undivided one-half thereof to each and that upon the payment of costs and administration fees, as herein above provided, said administrator pay the remainder of the money now in his hands belonging to said estate, one-half to said Laban Miles, and one-half to said John Kenny, and take their receipt therefor and file same in this court and thereupon be discharged. To all of which findings and judgment of the court said John Kenny excepts and upon his request the court fixes appeal bond at three hundred dollars."

On March 20, 1914, the said John Kenny served notice that he intended to appeal from the judgment of the Probate Court of Osage County, Oklahoma, to the District Court of Osage County, Oklahoma on both questions of law and fact (Certified Rec. 43-46). Thereafter an appeal bond was filed and said matter appealed to the District Court. On the 2nd day of April, 1915, after hearing the evidence the District Court made findings of fact and rendered the following judgment (Certified Rec. 117-120):

"It is therefore ordered, adjudged and decreed by the court that the plea of *res adjudicata* of appellee, Laban Miles, should be, and the same hereby is, by the court, sus-

not be made, the commissioners herein named shall make a valuation and appraisement of the property herein described anl make a report of their proceedings to the court."

After hearing the evidence, the probate court, upon the hearing of the final account of the administrator, rendered the following judgment (Certified Rec. 36-37).

"Now, on this 14th day of March, 1914, the above entitled matter coming on for hearing before Chas. R. Gray, special judge, pursuant to continuance as per Journal Entry in said matter made and rendered on the 28th day of February, 1914, claimant, Laban Miles, appearing by White & Widdows, his attorneys, and claimant, John Kenny, appearing by John Embry and A. S. Sands, his attorneys, and further appearing in his own proper person, and the court having heard the evidence and the arguments of counsel, and being fully advised in the premises finds:

"That the final account rendered by John L. Bird, administrator of the estate of said Lah-tah-sah, deceased, is true and correct, that said administrator has made no profit out of said estate and has made disbursements as stated in accounts, and statement of disbursements since rendition of said final account, and that said disbursements should be approved.

"The court further finds that the administrator is entitled to the sum of $12.00 as commission on amount of money belonging to said estate received and accounted for by said administrator.

"The court further finds from the evidence that the sole and only heirs of said Lah-tah-sah, deceased, are Laban Miles, surviving husband, and John Kenny, the only issue of said Lah-tah-sah, deceased, and that upon her death the entire estate of said Lah-tah-sah, deceased, descended in equal shares to said Laban Miles and John Kenny, to-wit: An undivided one-half to each.

"It is therefore ordered, adjudged and decreed by the

court that the final account of John L. Bird, administrator of said estate, be, and the same hereby is, by the court approved, and that said John L. Bird deduct from the money in his hands, belonging to said estate, the sum of $12.00 as compensation for services rendered as administrator in said estate, and file a receipt therefor, in this court; that said administrator pay the court costs now due and unpaid, out of the money in his hands, belonging to said estate, and file receipt therefor in this court.

"It is further ordered, adjudged and decreed by the court that the sole and only heirs of Lah-tah-sah, deceased, are Laban Miles, surviving husband, and said John Kenny, the only issue of said Lah-tah-sah, deceased; that upon the death of said Lah-tah-sah, deceased, her entire estate descended in equal shares to said Laban Miles and said John Kenny, to-wit, an undivided one-half thereof to each and that upon the payment of costs and administration fees, as herein above provided, said administrator pay the remainder of the money now in his hands belonging to said estate, one-half to said Laban Miles, and one-half to said John Kenny, and take their receipt therefor and file same in this court and thereupon be discharged. To all of which findings and judgment of the court said John Kenny excepts and upon his request the court fixes appeal bond at three hundred dollars."

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"It is therefore ordered, adjudged and decreed by the court that the plea of *res adjudicata* of appellee, Laban Miles, should be, and the same hereby is, by the court, sus-

tained and that the final account of said John L. Bird, administrator of said estate be, and the same hereby is, by the court, approved and that said John L. Bird deduct from the money in his hands belonging to said estate the sum of $12.00 as compensation for services rendered by him in said estate and file a receipt therefor; that said administrator pay the accrued costs in the county court now unpaid less the cost of preparing transcript for appeal, out of the money in his hands belonging to said estate, and file receipt therefor; that appellant, John Kenny, pay the costs accruing on appeal, including the costs of transcript in the county court.

"It is further ordered, adjudged and decreed by the court that the sole and only heirs of Lah-tah-sah, deceased, Osage Allottee No. 256, are Laban Miles, surviving husband, and John Kenny, the only living issue of said Lah-tah-sah, deceased, at the time of her death; that upon the death of said Lah-tah-sah, deceased, her entire estate descended in equal shares to said Laban Miles and to said John Kenny, to-wit, an undivided one-half thereof to each, and that upon the payment of costs and administration fees by said administrator as herein provided, that said administrator pay the remainder now in his hands belonging to said estate, one half to said Laban Miles and one-half to said John Kenny, and take their receipt therefor, to all of which rulings, orders and judgment of the court, said John Kenny objects and excepts, which objections and exceptions are by the court allowed."

BRIEF AND ARGUMENT.

No Federal Question Raised or Presented.

No Federal question is presented in the record. The only question litigated, or sought to be litigated, by petitioner, John Kenny, at any time, or in any action, is the question of the marriage of his mother, Lah-tah-sah, and the respondent, Laban Miles. If Laban Miles was the surviving husband of Lah-tah-sah, he was an heir. Sec. 6895 of Wilson's Revised and Ann. Statutes of Oklahoma, then in force, provides *inter alia* for descent in the following manner

> "FIRST: If the decedent leave a surviving husband or wife, and only one child or the lawful issue of one child, in equal shares to the surviving husband or wife, and child, or issue of such child."

This statute was made applicable to deceased members of the Osage tribe of Indians by Sec. 6 of the Osage Division Act, *supra*, which provides:

> "Sec. 6. That the lands, moneys, and mineral interests, herein provided for, of any deceased member of the Osage tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or of the State in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband, nor wife, in which case said lands, moneys and mineral interests must go to the mother and father equally" (35 State. L. 545).

Question of State Law.

Whether Laban Miles is a legal heir of Lah-tah-sah is to be determined by state law exclusively, and is not a federal question. Whether Laban Miles is such heir depends solely upon the question as to whether he was married to, and the surviving husband of Lah-tah-sah. This in turn is governed exclusively by state law, and is not a federal ques-

tion. No other question was raised by John Kenny in his objections to the administrator's final account in the probate court. No other question was raised on appeal from the probate court to the District Court of Osage County, Oklahoma. No other question, other than as to local procedure, was raised, or presented on appeal to the State Supreme Court. The sole object and purpose of John Kenny was to establish himself as the sole heir of his mother, Lah-tah-sah, even though to do so would brand her as an adulteress. In his petition in error to the State Supreme Court his allegations of error in the main are that the trial court erred in "adjudging and decreeing that the final account" of the administrator "be approved." (Not a federal question.) And erred in "adjudging and decreeing that said Laban Miles was the surviving husband, and one of the heirs." (Not a federal question) And erred in "distributing the estate" * * * "one-half to the said Laban Miles and one-half to the plaintiff in error," John Kenny. (Not a federal question)

Whether Lands Allotted Before or After Death Immaterial.

Whether the lands involved were allotted and deed to Lah-tah-sah as grantee in her lifetime, or to her heirs after her death; or whether the lands involved were restricted or unrestricted as to alienation have nothing whatever to do with the question as to whether said Laban Miles was the surviving husband of Lah-tah-sah, deceased, and thereby an heir.

Whether Parties Full-Bloods or Mixed-Bloods Immaterial.

Also whether Lah-tah-sah, Laban Miles and John Kenny was, or are, full blood or mixed blood Osage Indians, or whether a certificate of competency has been issued to either of them has nothing to do with the question as to whether Laban Miles was, or is, the surviving husband of Lah-tah-sah, deceased, and thereby an heir.

Again, by neither the manner in which, nor the procedure by which a state court decides a purely state ques-

tion, governed solely by state law, and where there is no adverse citizenship, can a federal question be raised or involved.

Whether Laban Miles is Surviving Husband Not Federal Question.

In *Roth* v. *Ehman et al.*, 17 Otto 319, 27 L. Ed. 499, the full decision of this Honorable Court reads as follows:

> "The only question in this case, controverted below, was whether Madelaine Roth, the plaintiff in error, was the widow of John George Roth, deceased, and that depended entirely on the validity of the decree of the Royal Matrimonial Court of Elwangen, in the Kingdom of Wurtemburg, annulling the marriage of the parties. The Supreme Court of Illinois decided in favor of the Wurtemburg decree and consequently, that the plaintiff in error was not the widow of the decedent and not entitled to dower in his estate, or to inheritance under the laws of Illinois. This presents no question of which we can take cognizance under Section 709 of the Revised Statutes. No right, title, privilege or immunity which could be claimed under the authority of the United States was involved, and the validity of no treaty or statute of, or any authority exercised under the United States was drawn in question. Neither was there any statute or authority of the State relied on, which was in conflict with the Constitution, treaties or laws of the United States.
>
> "The motion to dismiss for want of jurisdiction is granted."

Also:

> "The question of the true construction of a will depends wholly upon general rules of law and upon the local statutes, and in no degree upon the Constitution, laws or treaties of the United States." *Giles* v. *Little*, 134 U. S. 645, 33 L. Ed. 1062.

Whether Laban Miles was the surviving husband of

Lah-tah-sah was a question of fact to be determined by the State court only, and under the State law applicable to the facts.

Questions of Fact Not Reviewed by Federal Supreme Court.

The Supreme Court of the United States has no power under Sec. 237 R. S. to review a finding of fact by a State court, even though the finding determines whether or not a federal question is presented. *King* v. *W. Va.*, 216 U. S. 92, 54 L. Ed. 396; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 159, 43 L. Ed. 770.

> "The Supreme Court will not review a final state court judgment, even if it denies some title, right, privilege, or immunity of the unsuccessful party, unless it appears from the record that such title, right, privilege, or immunity was 'specially set up' or claimed and denied in the state court as belonging to such party under the Constitution or some treaty, statute, commission, or authority of the United States." *F. G. Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 41 L. Ed. 1149.

> "To give the Supreme Court of the United States jurisdiction to review a judgment of a state court because of its denial of a right, title, privilege, or immunity claimed under the Constitution, or any law or treaty of the United States, it must appear of record that such 'right, title, privilege, or immunity' was 'specially set up' or claimed at the proper time and in the proper way." *Texas & P. R. Co.* v. *Southern P. Co.*, 137 U. S. 48, 34 L. Ed. 614; *California Powder Works* v. *Davis*, 151 U. S. 389, 38 L. Ed. 206; *French* v. *Hopkins*, 124 U. S. 524, 31 L. Ed. 536;*Spies* v. *Illinois*, 123 U. S. 131, 31 L. Ed. 80; *Chappell* v. *Bradshaw*, 128 U. S. 132, 32 L. Ed. 369; *Leeper* v. *Texas*, 139 U. S. 462, 35 L. Ed. 225.

Only Right Claimed by Petition.

The only right claimed by petitioner, John Kenny, was the right which he claimed to relitigate the question of the

marriage of his mother, Lah-tah-sah, and the respondent, Laban Miles, when the matter came up in the county, or probate court, on the final account of the administrator for determination of heirs. This claim involved no "right, title, privilege, or immunity claimed under the Constitution, or any treaty or statute" of the United States. The judgment pleaded as *res judicata* was a state judgment, based on state law governing judgments rendered in actions for the partition of real estate, and whether the state court was right or wrong in sustaining the plea of *res judicata* it was purely a matter of local law and local practice. The admission of the former judgment in evidence in a matter triable only in a state court and under state law was a denial of no federal right and raised no federal question.

> "A decision against a right set up under U. S. Rev. Stat. Sec. 2339 providing for th protection of vested water rights, is not involved in a judgment of a state court denying such rights, which rest solely upon a decision upon questions of fact or local law upon which rights under that section depend." *Telleride Power Trans. Co.* v. *Rio Grande Western R. Co.*, 187 U. S. 659, 47 L. Ed. 307.

Decision of State Court Plainly Right

> "If it appears that the decision of the federal question was so plainly right as not to require argument, the writ should not be allowed." *Spies v. Illinois*, 123 U. S. 574, 28 L. Ed. 1084.

> "A federal question which rests upon an obviously false assumption is so plainly devoid of merit as to afford no basis for the exercise by the Federal Supreme Court of its appellate jurisdiction over a state court." *Parker v. McClain*, 237 U. S. 469, 59 L. Ed. 1051.

Sections of Oklahoma Statute on Partition.

The sections of the Revised Laws of Oklahoma 1910 on partition of real estate applicable in the case at bar as

relate to the partition judgment pleaded as *res judicata* are as follows:

> "Sec. 4940. When the object of the action is to effect a partition of real property, the petition must describe the property and the respective interest of the owners thereof, if known."
>
> "Sec. 4941. If the number of shares or interest is known; but the owners thereof are unknown, or if there are, or are supposed to be, any interests which are unknown, contingent or doubtful, these facts must be set forth in the petition with reasonable certainty."
>
> "Sec. 4943. The answers of the defendants must state, among other things, the amount and nature of their respective interests. They may also deny the interests of any of the plaintiffs, or any of the defendants."
>
> "Sec. 4944. After the interests of all the parties shall have been ascertained, the court shall make an order specifying the interests of the respective parties, and directing partition to be made accordingly."
>
> "Sec. 4955. The court shall have full power to make any order, not inconsistent with the provisions of this article, that may be necessary to make a just and equitable partition between the parties, and to secure their respective interests."

District Court Has Power to Determine Heirs in Partition Suit.

Under this, and the preceding sections of the statute quoted, we think that this court in a partition suit not only has jurisdiction to, but must make an order specifying the interests of the respective parties and direct that partition be made accordingly, as required by Sec. 4944, which would authorize the determination of heirship where ownership was acquired by inheritance. Sec. 4955 authorizes the court to make any order that may be necessary

to make a just partition between the parties and to secure their respective interests. That this is the rule in other states, see the following:

> "Any court assuming jurisdiction of the proceeding for partition must undertake to determine to whom the estate of the decedent has passed either by inheritance or devise."
>
> 30 Cyc. 198, and note 40.

That this is the law in Oklahoma is established by the following cases in which the district court decided questions of heirship in partition suits:

Irving v. *Diamond,* 100 Pac. 557, 23 Okl. 325.
DeGraffenreid v. *Iowa Land & Trust Co,,* 20 Okl. 687, 95 Pac. 624.
Barnett v. *Way,* 29 Okl. 780, 119 Pac. 418.
Divine v. *Harmon,* 30 Okl. 820, 121 Pac 219.
Bilby v. *Brown,* 34 Okl. 738, 126 Pac. 1024.
Coachman v. *Sims,* 36 Okl. 536, 129 Pac. 845.
Hill v. *Hill,* —— Okl., ——, 160 Pac. 1116.

There is no more reason why the district court has authority to pass on disputed questions of heirship in actions to quiet title, actions in ejectment and actions to declare a resulting trust, than in partition actions. The following are some of the Oklahoma cases where the District Court decided contested questions of heirship:

Cases Where Oklahoma District Court has Determined Heirs Affirmed by Federal Supreme Court.

Washington v. *Miller,* 34 Okl. 259, 129 Pac. 58, affirmed *Washington* v. *Miller,* 235 U. S. 422, 59 L. Ed. 295. (To quiet title.)
Woodward v. *DeGraffenreid,* 36 Okl. 81, 131 Pac. 162, affirmed in 238 U. S. 284, 59 L. Ed. 1310. (Ejectment.)
Brady v. *Sizemore,* 33 Okl. 169, 124 Pac. 615, affirmed in 235 U. S. 441, 59 L. Ed. 308. (To determine question of heirship.)

McDougal v. *Mckay,* 43 Okl. 261, 142 Pac. 987, affirmed in 237 U. S. 372, 59 L. Ed. 1001. (To determine heirs of Creek infant enrolled after death.)

Pigeon v. *Buck,* 38 Okl. 101, 131 Pac. 1983, and *Roberts* v. *Underwood,* 38 Okl. 376, 132 Pac. 673, consolidated and affirmed in 237 U. S. 386, 59 L. Ed. 1007. (To quiet title.)

OTHER OKLAHOMA CASES.

Ground v. *Dingman,* 33 Okl. 760, 127 Pac. 1078. (Quiet title.)

Morley v. *Fewell,* 22 Okl. 452, 122 Pac. 700. (Quiet title.)

Warren v. *Canard,* 30 Okl. 514, 120 Pac. 599. (Quiet title.)

Shellenberger v. *Fewell,* 34 Okl. 79, 124 Pac. 617. (Ejectment and quiet title.)

Hooks v. *Kennard,* 28 Okl. 457, 114 Pac. 744. (Ejectment.)

Sanders v. *Sanders,* 28 Okl. 59, 117 Pac. 338. (Ejectment.)

Cyr v. *Walker,* 28 Okl. 281, 116 Pac. 931. (Ejectment.)

Clarkson v. *Washington,* 38 Okl. 4, 131 Pac. 935. (Ejectment.)

Buck v. *Branson,* 34 Okl. 807, 127 Pac. 436. (Ejectment.)

Bruner v. *Sanders,* 26 Okl. 676, 110 Pac. 730. (Ejectment.)

Lamb v. *Baker,* 27 Okl. 739, 117 Pac. 189. (Ejectment.)

Reynolds v. *Fewell,* 34 Okl. 112, 124 Pac. 623. (Ejectment.)

Ground v. *Dingman,* 33 Okl. 760, 127 Pac. 1078. (Ejectment.)

Fearnow v. *Jones,* 34 Okl. 694, 126 Pac. 1015. (To declare resulting trust.)

Judgment of District Court in Partition Suit is a Final Judgment and May Be Appealed From.

The judgment and decree of partition fixed the interests and ownership of the lands involved in the parties to the action, who are the same parties to the case at bar. No appeal was taken, and time in which an appeal might have been taken had expired when the plea of *res adjudicata* was filed. An appeal could have been taken prior to sale. In *State ex rel. Mose* v. *District Court,* not yet officially reported, 149 Pac. 240, the Supreme Court of Oklahoma said:

> "There is no question but what an appeal from a decree of partitions lies from the district court to this court. * * * The purchaser at the sheriff's sale, if it should go to that extent, would have notice of the appeal, and therefore could not be an innocent or protected purchaser."

In the case just quoted from a writ of prohibition was sought to prevent the District Court of Marshall and the presiding judge thereof from entering an order determining the interests of all parties and partitioning certain real estate belonging to full-blood Mississippi Choctaw Indians, on the ground that the lands were restricted Indian lands and that the court had no jurisdiction to partition same. The writ was denied, the court holding that an appeal was a proper and adequate remedy, and that when an appeal will lie from the judgment about to be rendered a writ of prohibition will not lie.

Likewise had a remedy by appeal from the judgment of the District Court in the partition suit, and after the time expired in which an appeal could have been taken, the judgment became *res judicata* and was a good plea in bar in the subsequent proceedings.

The Judgment Pleaded as Res Adjudicata Not Subject to Approval by Secretary of Interior and Same Was Never Submitted for Approval.

The lands involved in the case at bar are *unrestricted,* but if they were restricted the judgment of the court fixing the rights and determining the interests and ownership of the parties does not require, and could not be affected by, the approval or disapproval of the Secretary of the Interior. The judgment of the court rendered in a partition suit is very similar to a judgment rendered in a proceeding to foreclose a real estate mortgage. The judgment in a foreclosure suit fixes the rights of the parties, determines the ownership in the lands if brought in question, establishes priority of liens and orders the lands sold on condition that payment be not made within a time stated. In the event of a sale same is conducted by the sheriff, and although a judicial sale, the acts of the sheriff are ministerial.

The judgment of the court in a partition suit fixes the rights of the parties, determines the ownership of the lands if brought in question, determines the number of shares and the amount of each, establishes priority of liens if any, and orders the lands sold on condition that same cannot be divided or partitioned in kind. In the event of sale, same is conducted by the sheriff as in the case of the sale of lands upon execution. While such sale is a judicial sale, the acts of the sheriff therein are ministerial, and the deed of the sheriff by which such sale is consummated might by law be made subject to the approval of the Secretary of the Interior or the Auditor of State, if a check upon the sheriff was desired in such matters. If the lands are divided or partitioned in kind, this is done by three commissioners appointed for that purpose. Their acts in dividing the lands and reporting such division are ministeral and might by law be made subject to the approval of the Secretary of the Interior, or the Auditor of State.

But not so as to the *judgment of the court* by which the rights of the parties, their ownership and interests in the lands are adjudicated. From such a judgment an appeal lies to the State Supreme Court. And if a federal question be involved, a further appeal would lie to the Federal Supreme Court. If such a judgment of the trial court is subject to approval of the Secretary of the Interior, then the judgment of the State Supreme Court on appeal, and the judgment of the United States Supreme Court on further appeal involving a federal question would be subject to the approval or disapproval of the Secretary of the Interior. Such is the position taken by the petitioner. It is unthinkable.

In conclusion we submit that no federal question is presented.

That the judgment or decree was not rendered in a "suit" as required by the statute authorizing writs of error, or writs of certiorari to state courts, but purely on *ex parte* probate proceedings which arose upon the filing of the final account of the administrator. And,

That the decision of the State Supreme Court is "so plainly right" as to warrant a denial of the petition.

We therefore respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

Chas. H. Merillat

H. P. White, Pawhuska, Oklahoma,

Counsel for Respondents.

INDEX.

	Page.
STATEMENT	1–10
SPECIFICATION OF ERROR	10
PROPOSITIONS	10
ARGUMENT	10
I. The allotment of the first, second, and third selections having been made during the lifetime of the allottee, no partition of the land was valid until approved by the Secretary of the Interior	10–18
II. Regardless of when the additional surplus allotment was made to the allottee, no partition thereof is valid until approved by the Secretary of the Interior	18
CONCLUSION	27
APPENDIX "A"	28

CASES CITED.

Aaron v. *United States*, 204 Fed. 943	17
Bouldin v. *Phelps*, 30 Fed. 547	26
Bowling v. *United States*, 233 U. S. 528	20
Brader v. *James*, 246 U. S. 88	20, 22
Creswill v. *Knights of Pythias*, 225 U. S. 246	11
John H Estate v. *Brown*, 201 Fed. 224	26
Jones National Bank v. *Yates*, 240 U. S. 541	11
Harmon v. *Struthers*, 48 Fed. 260	26
Levindale Lead & Zinc Mining Co. v. *Coleman*, 241 U. S. 432	16, 19, 20
McDugal v. *McKay*, 237 U. S. 372	19
Oklahoma City v. *McMaster*, 196 U. S. 529	23
Oklahoma Oil Co. v. *Bartlett*, 236 Fed. 488	25
Sunday v. *Mallory* (Jan. 7, 1919, *per curiam*, not reported)	20, 22
Talley v. *Burgess*, 246 U. S. 104	20, 22

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

JOHN KENNY, PETITIONER, *v.* LABAN MILES AND JOHN L. BIRD, ADMINISTRATOR of the estate of Lah-Tah-Sah, deceased.	No. 179.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF FOR PETITIONER.

STATEMENT.

The writ of certiorari in this case brings up for review a judgment of the Supreme Court of Oklahoma (R. 125) affirming a judgment of the District Court of Osage County (R. 71, 115), which adjudged the respondent Laban Miles to be the surviving husband of Lah-tah-sah, a deceased Osage Indian woman, and entitled to share in her estate equally with her sole surviving child, the petitioner John Kenny.

The case was begun in the County Court of Osage County by Miles, who filed a petition for letters of administration, alleging that he was the husband of

the deceased Osage allottee No. 256; that she died intestate August 19, 1908; that her only heirs were himself, and Kenny, her son; that as the surviving husband he was entitled to administer upon her estate; and recommending the appointment of the respondent, John Bird, as administrator. The general character and probable value of the estate was alleged as follows (R. 4):

> Lands allotted to her as a member of the Osage Tribe of Indians, in Osage County, Oklahoma, amounting to about 660 acres of the approximate yearly rental of $500.00, and tribal trust funds belonging to her as a member of such tribe, and to her credit in the Treasury of the United States, together with oil, gas and other mineral annuities of the approximate yearly income of $600.00.

Bird was appointed and qualified as administrator and letters of administration were issued to him (R. 7–8). Thereupon Miles filed a suit in the District Court of Osage County against Kenny for a partition of that part of the estate of the deceased consisting of the lands allotted to her, alleging that he as surviving husband and Kenny as the sole surviving child of the deceased were her only heirs at law (R. 49). Kenny answered denying the alleged heirship of Miles and alleging that he as the son and sole surviving heir of the deceased was entitled to the whole of her estate (R. 50). At the conclusion of the trial which followed the District Court entered a judgment that Miles was married to the deceased

in September, 1907, according to Osage Indian custom, and was her husband at the time of her death on August 19, 1908, and that Miles as surviving husband and Kenny as sole surviving child were the only heirs and owners in common of the allotment of the deceased Lah-tah-sah, Osage allottee No. 256, their respective interests being as follows (R. 52, 54):

> Laban Miles, plaintiff, Osage allottee No. 507, an undivided one-half.
>
> John Kenny, Osage allottee No. 257, an undivided one-half.

It was further ordered that partition be made accordingly, commissioners were appointed to make the partition, if that could be done without injury; otherwise to appraise the value of the property (R. 54). The commissioners reported their inability to make partition of the allotted land in kind without manifest injury, and that its market value was $3,900 (R. 59–60). On motion of Miles (R. 61) this report was accepted and an order of sale was entered (R. 62). It does not appear that any sale was ever made or that the judgment or any proceedings thereunder were ever approved by the Secretary of the Interior.

Pending the partition suit in the District Court the administration in the County Court was suspended. After the judgment in partition the administrator filed his final report in the County Court, showing his possession of the allotted lands of the appraised value of $3,900, and $210 cash on hand, derived from a lease of the lands, less disbursements

(R. 9–13), and praying that the court determine the heirs of the deceased to be Miles and Kenny and authorize distribution of "the above balance" to them in equal shares (R. 13). Kenny appeared and filed objections to the report, alleging that Miles was not an heir and that he was sole heir of the deceased (R. 14). Miles thereupon filed a "plea of *res judicata*" setting out the judgment of partition rendered by the District Court as conclusive of his marriage to the deceased (R. 14). Kenny demurred on the ground that the judgment was void for want of jurisdiction, and this being overruled (R. 18), he answered (R. 19) with a general denial and also denying that Miles was ever married to the deceased, and alleging that the District Court was without jurisdiction to render the partition judgment, the land being subject to restriction against alienation, and (R. 20)—

> That said decedent, said Laban Miles and said John Kenny are and were members of the Osage Tribe of Indians, of the full blood, residing in Osage County, Oklahoma, neither of whom have received a certificate of competency, and all of whom were and are incompetent Indians; and the Secretary of the Interior refused and failed to confirm or approve said judgment and proceedings of said District Court, and the same is void and of no effect.

The County Court, on motion of Miles, struck out that portion of Kenny's answer denying the marriage of Miles to the deceased (R. 21) and entered a judg-

ment approving the final account of the administrator, allowing him $12 as compensation for services, and directing him to "pay the remainder of the money now in his hands belonging to said estate, one-half to Laban Miles, and one-half to said John Kenny, and take their receipt therefor and file the same in this Court and thereupon be discharged" (R. 22). The judgment also contained the following determination for the disposition of the "entire estate" (R. 22):

> The court further finds from the evidence that the sole and only heirs of said Lah-tah-sah, deceased, are Laban Miles, surviving husband, and John Kenny, the only issue of said Lah-tah-sah, deceased, and that upon her death *the entire estate* of said Lah-tah-sah, deceased, descended in equal shares to said Laban Miles and said John Kenny, to-wit: An undivided ½ to each. [Italics ours.]

And also the following (R. 22):

> It is further ordered, adjudged and decreed by the Court, that the sole and only heirs of Lah-tah-sah, deceased, are Laban Miles, surviving husband, and said John Kenny, the only issue of said Lah-tah-sah, deceased; that upon the death of said Lah-tah-sah, deceased, *her entire estate* descended in equal shares to said Laban Miles and said John Kenny, to wit: an undivided ½ thereof to each. [Italics ours.]

From this judgment Kenny appealed to the District Court of Osage County, the same court that rendered the partition judgment (R. 26), and the

case was there tried *de novo* on the pleadings filed in the County Court (R. 33 *et seq.*).

The District Court sustained a motion made by Miles in the County Court to strike out all of Kenny's answer to the plea of *res judicata* except the general denial (R. 34). On the trial it was admitted that the deceased allottee, as well as both Kenny and Miles, were full-blood members of the Osage Indian Tribe, and that none of them had ever received a certificate of competency (R. 46–47). It was also shown that the deceased died August 19, 1908 (R. 42, 50), and that the deeds for her allotment conveying to her separately the homestead of 160 acres and surplus of 500.12 acres were dated September 23, 1908, and May 5, 1909 (R. 66, 68). Miles offered the partition judgment to which Kenny objected on substantially the grounds stated in his answer to the plea of *res judicata*, but his objection was overruled (R. 36). Kenny offered to prove by witnesses and declarations of Miles that Miles never was married to the deceased, but the testimony was excluded on the ground that the marriage had been conclusively established by the partition judgment (R. 41, 43, 45–46). Thereupon the District Court entered judgment, affirming the judgment of the County Court with reference to the administrator's account and division of the small sum in his hands between Miles and Kenny, and further determining the disposition of the "entire estate" as follows (R. 72, 117):

The court further finds from the evidence that the heirs of the estate of said Lah-tah-sah, deceased, have heretofore been determined by the District Court of Osage County, Oklahoma, in the partition suit of Laban Miles, plaintiff, vs. John Kenny, defendant, No. 1896, as per judgment of court pleaded herein by said Laban Miles as a plea of res adjudicata. That said plea of res adjudicata should be sustained.

The court further finds from the evidence that the sole and only legal heirs of said Lah-tah-sah, deceased, are appellee, Laban Miles, surviving husband and appellant, John Kenny, the only living issue of said Lah-tah-sah, deceased; that upon the death of said Lah-tah-sah, deceased, *her entire estate consisting of lands, moneys and mineral interests acquired by her through the division of the lands of the Osage Indians in Oklahoma, and the segregation of moneys belonging to said tribe held by the United States, as a member of the Osage Tribe of Indians,* descended in equal shares to said Laban Miles, surviving husband, and said John Kenny, only living child, to wit: an undivided one-half to each. [Italics ours.]

And further (R. 73, 117):

It is further ordered, adjudged and decreed by the court that the sole and only heirs of Lah-tah-sah, deceased, Osage Allottee, No. 256, are Laban Miles, surviving husband, and John Kenny, the only living issue of said Lah-tah-sah, deceased, at the time of her death; that upon the death of said Lah-tah-

> sah, deceased, *her entire estate* descended in equal shares to said Laban Miles and to said John Kenny, to wit: an undivided one-half thereof to each. [Italics ours.]

The Supreme Court of Oklahoma considered the case as if it involved a division of the allotment, and that alone, between Miles and Kenny, and finding, contrary to the record, that the allotment was selected after the allottee's death, held that the lands went to the heirs of the allottee in their own right free from restriction against alienation, and affirmed the judgment. In its opinion (R. 196) the court said:

> Plaintiff in error seeks a reversal of a judgment of the District Court of Osage County, rendered April 2, 1915, upon appeal from the County Court of that county, ordering a distribution of the estate of a deceased member of the Osage Tribe of Indians, *consisting of lands selected and patented in her name subsequent to her death, and certain proceeds arising from the rental thereof.*
>
> The decedent Lah-tah-sah, a member of the Osage Tribe, entitled to a distributive share of the tribal property by virtue of an Act of Congress approved June 28, 1906 (34 Stat. L. 539), died intestate in 1908, before receiving the same. *After her death the lands involved were selected in her right* and deeds therefor, approved by the Secretary of the Interior, were executed in her name as grantee, and recorded. [Italics ours.]

And again (R. 204):

> We hold that the Act of June 28, 1906, placed no restrictions upon alienation by heirs of inherited lands allotted and deeded in the right of a member of the Osage tribe after his death, save only the interest in the minerals, reserved to the tribe, the individual disposition of which is expressly inhibited.
>
> The evident purpose of the Act of April 15, 1912, supra, was not to impose restrictions upon alienation of Osage lands, but to authorize the conveyance of such of said lands to which restrictions had attached by reason of their allotment to living members of the tribe who had subsequently died, leaving surviving them Indian heirs, members of the tribe, to whom certificates of competency were issued.

And finally (R. 205):

> We conclude that the district court of Osage County had jurisdiction to partition the lands involved, and that its judgment was conclusive of the rights of the parties in this proceeding to share equally in the disposition of the lands in question.

The act of June 28, 1906, 34 Stat. 539, under which was made the division of Osage tribal land and its allotment to individual Osage Indians, provided, as hereinafter shown, for first, second, and third selections of 160 acres each by each allottee, one 160-acre tract to be designated by the allottee as a homestead, and after these selections had been made the Osage Commission was directed to allot

as equally as practicable among the Osages the remaining lands.

SPECIFICATION OF ERROR.

Error in ruling that the allotment of Lah-tah-sah, Osage Indian Allottee No. 256, passed to her incompetent heirs subject to partition without approval by the Secretary of the Interior.

PROPOSITIONS.

1. The allotment of the first, second, and third selections having been made during the lifetime of the allottee, no partition of the land was valid until approved by the Secretary of the Interior.

2. Regardless of when these selections or the additional surplus allotment were made to the allottee, no partition thereof is valid until approved by the Secretary of the Interior.

ARGUMENT.

I.

The allotment of the first, second, and third selections having been made during the lifetime of the allottee, no partition of the land was valid until approved by the Secretary of the Interior.

While this court will not ordinarily review the findings of fact by the State Supreme Court, the question of whether the allotment in controversy is subject to partition without the approval of the Secretary of the Interior is a question both of law and fact so intermingled as to make it necessary, for the

purpose of passing on the Federal question involved, to analyze the facts and to determine whether there is any substantial evidence in the record to sustain the finding that the allotment was selected after the allottee's death, as the right to partition these lands without the approval of the Secretary, the Federal question involved, is made to depend in the judgment of the Supreme Court of Oklahoma upon this finding. This brings this case well within the exceptions to this rule, pointed out in

Jones National Bank v. *Yates*, 240 U. S. 541, 552, and cases cited.

Creswill v. *Knights of Pythias*, 225 U. S. 246, 261, and cases cited.

The division of the Osage lands and funds and the allotment of the lands among the members of the tribe were made under the provisions of the act of June 28, 1906, 34 Stat. 539.

Section 2 provides: (First) That each member of the tribe upon the tribal rolls should be permitted to select 160 acres as the first selection; (third) after each member had made his first selection each was permitted to make an extra selection of 160 acres in the manner provided in making the first selection; (fourth) after each member had selected a second selection each member was permitted to make a third selection of 160 acres as provided in making the first and second selections; each member was then permitted to designate which of his three selections should be a homestead, and his certificate of

allotment and deed was to designate the same as a homestead, which was inalienable and nontaxable until otherwise provided by act of Congress; the other two selections, together with his or her share of the remaining lands allotted to the member, were to be known as surplus lands and were to be inalienable for 25 years, except by a later provision of the same section (seventh) the Secretary of the Interior was empowered to issue certificate of competency authorizing the sale and conveyance of lands except the homestead; (fifth) after each member had made the first, second, and third selection of 160 acres, the remaining land was to be divided as equally as practicable among the members by the commission appointed to supervise the selection and division of these lands; (sixth) the selections provided for were to be made under the supervision of this commission, and the schedule of selections was subject to the approval of the Secretary of the Interior.

The act of April 18, 1912, 37 Stat. 86, is supplementary to and amendatory of the act of 1906, and provides, among other things, that the property of the deceased allottees of the Osage tribe shall in probate matters be subject to the county courts in the State of Oklahoma and that no land is to be sold or alienated under the provisions of section 3 of the act without the approval of the Secretary of the Interior. Section 6 of the act provides that no partition or sale of the restricted lands of a deceased Osage allottee shall be valid until approved by the

Secretary of the Interior. For convenience, this section is printed in the margin hereof.[1]

The opinion of the Supreme Court of Oklahoma that this land is free from restriction is based upon its finding that the lands were selected and allotted in the right of Lah-tah-sah after her death. It is clear that section 3 of the act of April 18, 1912, prohibits the alienation of restricted lands without the approval of the Secretary of the Interior, and section 6 provides that no partition or sale thereof shall be valid until approved by the Secretary of the Interior. Therefore it follows that if this land was allotted to a living member it is restricted land and the action of the Supreme Court in directing its partition and sale is erroneous.

[1] Section 6. That from and after the approval of this act the lands of deceased Osage allottees, unless the heirs agree to partition the same, may be partitioned or sold upon proper order of any court of competent jurisdiction in accordance with the laws of the State of Oklahoma: *Provided*, That no partition or sale of the restricted lands of a deceased Osage allottee shall be valid until approved by the Secretary of the Interior. Where some of the heirs are minors, the said court shall appoint a guardian ad litem for said minors in the matter of said partition, and partition of said land shall be valid when approved by the court and the Secretary of the Interior. When the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed. If some of the heirs are competent and others have not certificates of competency, the proceeds of such part of the sale as the competent heirs shall be entitled to shall be paid to them without the intervention of an administrator. The shares due minor heirs, including such minor Indian heirs as may not be tribal members and those Indian heirs not having certificates of competency, shall be paid into the Treasury of the United States and placed to the credit of the Indians upon the same conditions as attach to segregated shares of the Osage national fund, or with the approval of the Secretary of the Interior paid to the duly appointed guardian. The same disposition as herein provided for with reference to the proceeds of inherited lands sold shall be made of the money in the Treasury of the United States to the credit of deceased Osage allottees.

It is evident that the allotment in this case was made to Lah-tah-sah while in life.

An analysis of the provisions of the act of 1906 shows that the designation of a homestead was not to be made by a member of the Osage tribe until after the selection of the third 160 acres provided for in the act.

Lah-tah-sah died August 19, 1908, and the deed to her homestead was made September 23, 1908. While the record does not expressly state that any selection of any of the allotted land as a homestead was made during her lifetime, it is a fair presumption from this evidence, taking into consideration the statutory requirements, that it was done, and that at that time the first, second, and third selections of 160 acres each had been made. The law did not contemplate the designation of a homestead for a dead Indian, and such a designation by a living allottee was to have been made only after the selection of the third 160 acres. When it is considered that these selections and designations had to be made under the supervision of a commission and the approval of the allotments was to be made by the Secretary of the Interior, the deduction is irresistible that it was impossible, in view of the time necessarily consumed in these proceedings, that the selection could have been made after August 19, 1908. These allotments were made by families, and Lah-tah-sah was allotted as a head of a family as No. 256, while her son, John Kenny, the petitioner, was allotted as No. 257.

Section 6 of the act of 1912 confers jurisdiction upon the probate court of the State of Oklahoma for the partition of "the lands of deceased Osage allottees" subject to the approval of the Secretary of the Interior, and the petition for letters of administration filed by Laban Miles in the county court of Osage County (R. 4) in the matter of the estate of Lah-tah-sah, Osage allottee No. 256, deceased, alleges that the decedent left an estate in the county of Osage, the general character being stated as lands allotted to her as a member of the Osage Tribe of Indians, in Osage County, Okla. The theory upon which the administrator proceeded, therefore, was that the allotment was a part of the estate of the decedent and did not go direct to the heirs in their own right, and whatever title vested in the heirs vested by inheritance and not by virtue of selection after the death of the allottee.

After each allottee had selected three 160-acre tracts under the law, the commission was authorized to divide the remaining lands as equally as practicable among the members of the tribe. The two selections other than the 160-acre homestead tract were known as surplus lands, and the lands parcelled out among the Indians by the commissioners in their final schedule were known as additional surplus lands. The contention that the homestead, and the two surplus selections of Lah-tah-sah, containing 480 acres of 660.12 acres, comprising her entire allotment, were not selected until after her death, is conclusively answered by the Osage schedule of the first, second,

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and third selections, a certified copy of which is printed herewith as Appendix "A." From this schedule it appears that these selections were made and allotted prior to June 16, 1908, when the schedule was reported to the Secretary of the Interior for approval, and comprise (first selection) the N. W. ¼ of sec. 26, T. 24, R. 4, 160 acres, homestead; (second selection) the N. E. ¼ of sec. 30, T. 28, R. 9, 160 acres; (third selection) the S. E. ¼ of sec. 30, T. 28, R. 9, 160 acres. Inasmuch as the allottee's death did not occur until August 19, 1908, it is clear that these three selections were selected by and allotted to her during her lifetime, and, under any view of the case, come within the provision of the act of 1912 prohibiting the alienation of the lands of deceased allottees of the Osage tribe or their partition without the approval of the Secretary of the Interior.

This court fully reviewed the provisions of the act dividing the Osage lands and funds in *Levindale Lead & Zinc Mining Co.* v. *Coleman*, 241 U. S. 432. While the questions in controversy here were not raised in that case, in analyzing this act and deciding that the land of a white man inherited from a member of the tribe was unrestricted, the court said (p. 437):

> Taken in their natural sense, the provisions of the fourth paragraph of section 2 apply only to allotments made to members of the tribe. There is nothing to suggest that a non-member should designate a "homestead," and unless lands were thus segregated the restrictions as to "homesteads" would not apply. With respect to "surplus lands" it will be observed

> that it is only selections of each "member," and the share of remaining lands "allotted to the member," which constitute lands so described and thus come under the stated restrictions.

This clearly indicates the views of this court to the effect that selections of members of the tribe come under the "stated restrictions."

Aaron v. *United States*, 204 Fed. 943, is directly in point, and holds that the lands of full-blood Osage Indian allottees selected by and allotted to them before their decease were inalienable by their full-blood heirs under the act of June 28, 1906, and says (p. 945):

> The fact that the deeds of these allotments were subsequently made to the heirs of Cena June after her decease is immaterial. When the allotments had been made, the equitable title, the right to the legal title, and the entire beneficial interest in these lands, subject to the restrictions upon alienation imposed upon them by the act of Congress at the time they were allotted, vested in the allottee, and the titles to these allotments under the subsequent deeds to her heirs related back to and took effect at the time of the allotments. There is therefore no escape from the conclusion that the titles of the heir to the homestead lands and the surplus lands of this allottee were subject to the respective restrictions imposed upon those classes of lands by the act of June 28, 1906. And this concludes the controversy about the surplus lands; for it is not claimed that the restriction imposed upon their alienation by the fourth paragraph of section 2 had been removed on March 5, 1909, when Buffalo made his deeds.

II.

Regardless of when the additional surplus allotment was made to the allottee, no partition thereof is valid until approved by the Secretary of the Interior.

The record does not explicitly disclose when the final division and allotment among the Osage Indians was made by the allotting commission nor, as aforesaid, when the homestead, surplus, and additional surplus land of Lah-tah-sah was allotted to her. We have shown from the schedule of the first, second, and third selections, however, that those selections were allotted to her prior to June 16, 1908, and therefore prior to her death on August 19, 1908. The Schedule of Final Division of Osage Lands made by the Osage Allotting Commission (Appendix "A") was certified to the Secretary of the Interior March 29, 1909, and it there appears that prior to that time Lot 3, the E. ½ of the SW. ¼ of the NW. ¼, the SE. ¼ of the NW. ¼, and the N. ½ of the SE. ¼ of sec. 4, T. 20, R. 10, containing 180.12 acres, was allotted to her. The act of 1906 did not contemplate any selection by the allottee of his or her interest in the land remaining after the first, second, and third selections, but the duty was put upon the commission to divide these lands "as equally as practicable." This division was in the nature of a partition among tenants in common and the right to the property existed before the allotment. The act provided for the allotment of all the Indians on the roll of the tribe as it existed on January 1, 1906, and of certain children therein specified who were not on the roll, and section 6 of the act provides:

> That the lands, moneys, and mineral interests, herein provided for, of any deceased

> member of the Osage tribe, shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma.

The allotment therefore created no new right in the heirs and they acquired their rights by inheritance and not by purchase. *McDougal* v. *McKay*, 237 U. S. 372, 383. The contention that the restriction on alienation imposed by this act applied only to lands allotted to living members is inconsistent with the evident purpose of the act, which was to protect the property of these Indians, after division, in the hands of incompetents, and to put upon the Secretary of the Interior the duty and obligation of administering this property. Such a contention is absolutely inconsistent also with the provisions of section 7 of the act, which, after providing that the lands are to be set aside for the sole use and benefit of members of the tribe, or their heirs, and that the members or their heirs shall have the right to use and lease the lands, further provides:

> That all leases given on said lands for the benefit of individual members of the tribe entitled thereto, or for their heirs, shall be subject only to the approval of the Secretary of the Interior.

This inhibits the leasing of the lands without the approval of the Secretary, and it is wholly at variance with any construction of the act which permits such heirs to sell any of their lands without the approval of the Secretary.

The statute must be construed in the light of the policy it was intended to execute—the policy of protecting the welfare of the wards of the United States. *Levindale Lead & Zinc Mining Co.* v. *Coleman, supra,*

p. 437, and restrictions were intended to be placed on all the lands in the hands of incompetents. It is immaterial to determine whether these restrictions attached immediately upon the final division of this land by the Osage allotting commission and ran with the land until they expired by limitation (*Bowling* v. *United States*, 233 U. S. 528), since the language of the act plainly shows that the Indians themselves were deemed to be subjected to the restrictions. *Levindale Lead & Zinc Mining Co.* v. *Coleman*, *supra*, p. 438. It is further immaterial to determine whether these restrictions were placed upon the lands or the Indians by the act of 1906, for the act of 1912 clearly shows that Congress had restricted the sale (sec. 3) and partition (sec. 6) of the lands of deceased Osage allottees, and section 6 specifically provides when the restriction or alienation by such heirs shall be removed in the following language:

> * * * When the heirs of such deceased allottees have certificates of competency or are not members of the tribe the restrictions on alienation are hereby removed.

The right of Congress to reimpose restrictions on alienation can not now be questioned.

Brader v. *James*, 246 U. S. 88; *Talley* v. *Burgess*, 246 U. S. 104.

Sunday v. *Mallory*, decided January 7, 1919, not yet reported.

In *Brader* v. *James* the allotment was made during the lifetime of the allottee, but the 21-year restriction against alienation imposed by section 12 of the Choctaw and Chickasaw Agreement of July 1, 1902, 32 Stat. 641, 642, had been removed by the death of

the allottee before the act of April 26, 1906, 34 Stat. 137, 145 (sec. 22), which provided as follows:

> That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe.

The question was whether a conveyance after this act by a full-blood Choctaw heir of the allottee required for its validity approval by the Secretary of the Interior, or, in other words, whether, the restriction against alienation imposed by the Choctaw and Chickasaw Agreement having been removed, Congress had the right to reimpose the restriction provided in the statute requiring all conveyances made by full-blood heirs to be subject to the approval of the Secretary. The right of Congress to reimpose this restriction was upheld.

In *Talley* v. *Burgess* and *Sunday* v. *Mallory* the allotments in question were made after the death of the allottee. The *Talley* case involved an agreement with the guardian of a minor Indian heir, and the *Sunday* case involved conveyances of adult full-blood Indian heirs. The case of *Sunday* v. *Mallory* was reversed without opinion, on the authority of *Brader* v. *James* and *Talley* v. *Burgess*, and in the latter case the court said (p. 108):

> It is contended that this section applies only to heirs of a deceased Indian whose selection has been made by himself, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which the decedent belonged. But in our view Congress in the passage of section 22 had in contemplation that an Indian duly enrolled and entitled to share in the tribal property and lands might die before receiving the allotment to which he, or she, was entitled. Congress had made provision in section 20 of the Cherokee Agreement that such land might be allotted in the name of the deceased, and should with the proportionate share of the other tribal property descend to the heirs of the one who would have been entitled, if living. It also provided that the selection for a decedent should be made by a duly appointed administrator or executor, or, in default of such selection, the Dawes Commission should designate the land to be allotted. We think minor heirs who thus receive lands are within the meaning and purpose of the statute, as much so as they would have been had the land been selected by the ancestor in his lifetime.

While section 22 of the act of April 26, 1906, is not identical in its terms with the act of June 28, 1906, under consideration here, the purposes of the acts are sufficiently similar to make the reasoning in these cases apply to the case at bar, and there is no more reason why the incompetent heirs of Osage allottees are not within the meaning and purposes of the statute in this case, if the lands were apportioned to the allottee after her death, than they would have been had the land been apportioned by the Osage commission during her lifetime.

Nor is there anything in section 22 of the act of April 26, 1906, any more definitely evidencing the intention of Congress that the restrictions therein should apply to allotments made after the death of the allottee than appears in the Osage Allotment Act that the restrictions in that act were intended to apply to allotments made to deceased Osage allottees after death. On the contrary, Congress specifically authorized in the case of Osage Indians the allotment of the Osages on the roll of the tribe as it existed January 1, 1906. This clearly contemplated that an Indian on this roll might die before receiving the allotment to which he or she was entitled, or, indeed, that such an Indian might have died between January 1, 1906, and the date of the passage of the act. In view of this, there is a proviso that the lands of a deceased member should descend to his or her legal heirs. The Osage Commission was authorized to designate the additional surplus allotment just as in the case of the Cherokees the Dawes Commission was authorized, in default of selection by the allottee, to

designate the land to be allotted. In view of the decisions of this court relative to the statute affecting the Five Civilized Tribes, and of the similarity of the statute passed at the same session of Congress providing for the individual allotment of the Osages, it can not be controverted that the incompetent Osage full-blood Indians who inherit lands from allottees to whom allotments were made after death come within the stated restrictions and "within the meaning and purpose of the statute as much so as they would have been had the land been selected by the ancestor in his lifetime."

As before pointed out, section 3 of the act of April 18, 1912, confers jurisdiction upon the county courts of the State of Oklahoma in probate matters, but provides that no lands shall be sold or alienated thereunder without the approval of the Secretary of the Interior; and section 6 confers power upon courts of competent jurisdiction in the State of Oklahoma to partition the land of deceased Osage allottees in accordance with the laws of the State of Oklahoma, but provides that no partition or sale should be valid without the approval of the Secretary of the Interior. The district courts of Oklahoma are courts of competent jurisdiction in accordance with the laws of that State for the partition of lands, and in the proceedings for partition in this case before that court it determined the heirs as a necessary proceeding in partition matters and decreed the sale of the land. Probate proceedings had been taken in the County Court previously to the commenc-

ing of partition proceedings in the District Court by Miles upon a petition for letters of administration, but the proceedings in the County Court were suspended after the appointment of an administrator and the filing of the partition proceedings in the District Court. The findings of the District Court in the partition proceedings were pleaded and sustained as *res judicata* in the subsequent probate proceedings in the County Court, and this was affirmed by the District Court upon appeal, where the matter came up *de novo* (R. 21, 22).

It is apparent that if the lands of the deceased allottee are restricted lands, the action of the District Court was incomplete and invalid until approved by the Secretary of the Interior. While the invalidity of the order sustaining the plea of *res judicata* is perhaps a matter for the determination of the Secretary of the Interior in further proceedings herein, it is clear that an invalid order can not be invoked to sustain a plea of *res judicata*.

The jurisdiction existing in the District Court of Oklahoma to partition the restricted land of the deceased allottee was only that expressed in the act of Congress. In exercising this jurisdiction its power was limited by the act and its judgment had no validity until approved by the Secretary. Its function is that of a Federal agency and it "does not exercise judicial power conferred by the laws or constitution of the State of Oklahoma, nor any Federal judiciary power. *Truskett et al.* v. *Closser*, 198 Fed. 835"; *Okla. Oil Co.* v. *Bartlett*, 236 Fed. 488, 494.

"According to the language of all the authorities, to conclude the parties the former judgment must have been final." *Harmon* v. *Struthers*, 48 Fed. 260, 261.

It is well settled that in order to support *res judicata* there should have been a judicial determination of the rights in controversy with a final decision thereon. The mere findings of fact by the court upon which no judgment has been directed do not constitute a judgment or raise an estoppel. *Bouldin* v. *Phelps*, 30 Fed. 547, 578; *John II Estate* v. *Brown*, 201 Fed. 224, 242, and cases cited.

Until the action of the Secretary of the Interior in partition proceedings was entered the matter therefore was *sub judice*, and the findings and judgment of the District Court are not *res judicata*. In order to give the judgment in partition validity, Congress required the approval of the Secretary, and the judgment of the Secretary and not the findings and judgment of the District Court definitively settles the controversy in this case. The findings or judgment of the District Court is the preliminary determination of the case upon which the final judgment of the Secretary is to be entered. The case is analogous to one where there is a verdict of the jury or findings of a court upon which no formal nor final judgment has been entered. The language of this court in *Oklahoma City* v. *McMaster*, 196 U. S. 529, 533, is in point:

> Without a judgment the plea of *res judicta* has no foundation; and neither the verdict of

a jury nor the findings of a court, even though in a prior action, upon the precise point involved in a subsequent action and between the same parties, constitute a bar. In other words, the thing adjudged must be by a judgment. A verdict, or finding of the court alone, is not sufficient. The reason stated is, that the judgment is the bar and not the preliminary determination of the court or jury. It may be that the verdict was set aside, or the finding of facts amended, reconsidered, or themselves set aside or a new trial granted. The judgment alone is the foundation for the bar. *Springer* v. *Bien*, 128 N. Y. 99.

CONCLUSION.

The judgment of the Supreme Court of the State of Oklahoma, holding that the District Court had complete jurisdiction to partition and sell these lands without the approval of the Secretary of the Interior, is therefore erroneous and should be reversed and the case be remanded to that court with directions to remand it to the District Court with leave to John Kenny, the petitioner herein, to pursue his remedy before the Secretary of the Interior.

Respectfully submitted.

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JANUARY, 1919.

APPENDIX "A."

Schedule of first, second, and third selections of the Osage Indians, residing on the Osage Reservation in Oklahoma, made by the Osage Allotting Commission, under the provisions of the act of Congress, approved June 28, 1906 (34 Stat. L., 539), and the instructions of the Indian Office of August 4, 1906.

Allotment No.	Name of allottee.									Subdivision.	Section.	Town.	Range.	Acres.	100ths.	Area reserved for railroad purposes.			Remarks.
	Permanent name.			Indian name.	English translation or English name.	Male.	Female.	Age.	Relation in family.							M., K. & T.	M. V.	A., T. & S. F.	
	Reg. No.	Surname.	First name.																
255	260	.....	.....	.....	Richard Kenny	M.	....	52	Head.	First selection Hd.: NE.¼	31	23	8	160	....	.....	.....	.....	Homestead.
										Second selection: W.½ of SW.¼	5	.....	.....	.....	....	.....	.....	.....	
										N.½ of NW.¼	8	24	7	160	....	.....	.....	.....	
										Third selection: SW.¼	9	24	7	160	....	.....	.....	.....	
256	265	.....	.....	Lah tah sah	.....	....	F.	48	Head.	First selection Hd.: NW.¼	26	24	4	160	....	.....	.....	.....	Homestead.
										Second selection: NE.¼	30	28	9	160	....	.....	.....	.....	
										Third selection: SE.¼	30	28	9	160	....	.....	.....	.....	
257	266	.....	.....	.....	John Kenny	M.	....	25	Head.	First selection Hd.: Lots 2, 3, and 4	25	.....	.....	.....	.....	.....	.....	.....	Homestead.

										SE.¼ of NE.¼; NE.¼ SE.¼	26	24	4	146	85	.....	.....	.....	Homestead.
										Second selection: SE.¼	6	27	9	160	.....	.....	.....	.....	
										Third selection: Lots 1 and 2; S.½ of NE.¼	6	27	9	161	13	.....	.....	.....	
258	267	.....	.....	Wah hrah tum pah.	.....	.....	F	22	Wife..	First selection Hd.: SW.¼	9	24	6	160	.....	.....	.....	.....	Homestead.
										Second selection: SE.¼	12	25	3	160	.....	.....	.....	.....	
										Third selection: SW.¼	15	25	9	160	.....	.....	.....	.....	Petition to sell.

NOTE.—Initials heading the column of "Area reserved for railroad purposes" designate railroad companies as follows: "M., K. & T." designates Missouri, Kansas & Texas Railway Company, total area reservations, 1,114.09 acres; "M. V." designates Midland Valley Railroad Company, total area reservations, 1,267.50 acres; "A., T. & S. F." designates Atchison, Topeka & Santa Fe Railway Company, total area reservations, 612.49 acres.

We, the undersigned, comprising the Osage Allotting Commission, hereby certify that the first, second, and third selections of lands as shown on the attached and foregoing schedule, embracing pages Nos. 1 to 715, both inclusive, were made by or for the Osage Indians, and was duly allotted to them by us in the capacity of the Osage Allotting Commission; that each person whose name appears on said schedule is legally entitled to the land assigned him or her, and that the selections and allotments were made in conformity to the provisions of the act of Congress approved June 28, 1906 (34 Stat. L., 539), and the instructions of the Commissioner of Indian Affairs of August 4, 1906.

Done at Pawhuska, Oklahoma, the sixteenth day of June, 1908.

CHAS. E. MCCHESNEY,
Chairman.

CASSIUS R. PECK,
Commissioner.

BLACK DOG (his x mark),
Commissioner.

Witnesses:
WILLIAM PRYOR.
HEALY N. LOOMIS.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, D. C., November 19, 1908.

The annexed and foregoing schedule of first, second, and third selections of the Osage Indians, made in accordance with the provisions of the act of Congress approved June 28, 1906 (34 Stat. L., 539), is respectfully submitted to the Secretary of

the Interior with the recommendation that it be approved.

C. F LARRABEE,
Acting Commissioner.

DEPARTMENT OF THE INTERIOR,
Washington, November 19, 1908.

Agreeably to the recommendation of the Acting Commissioner of Indian Affairs, the annexed and foregoing schedule of first, second, and third selections of the Osage Indians, made in accordance with the provisions of the act of June 28, 1906 (34 Stat. L., 539), is hereby approved, and the Commissioner of Indian Affairs is hereby directed to cause deeds to be executed to the allottees therein named conformably with the provisions of the said act of Congress.

JESSE E. WILSON,
Assistant Secretary.

100263—19——3

Schedule of final division of Osage lands for Osage Indians residing on the Osage Indian Reservation in Oklahoma, made by the Osage Allotting Commission, under the provision of the Act of Congress approved June 28th, 1906 (34 Stat. L. 539) and the instructions of the Indian Office of August 4th, 1906.

Allotment No.	Name of allottee.								Relation in family.	Subdivision.	Section.	Town.	Range.	Acres.	100ths.	Area reserved for railroad purposes.			Remarks.
	Permanent name.			Indian name.	English translation or English name.	Male.	Female.	Age.								M.K. & T.	M.V.	A.T. & S.F.	
	Reg. No.	Surname.	First name.																
256	205	.....	.....	Lah-tah-sah...	.....	....	F.	48	Head.	Lot 3, E½ of SW¼ of NW¼, SE¼ of NW¼ and N½ of SE¼.	4	20	10	180	12	.....	.....	.....	Tel rpd. 190, 3/18.
257	206	.....	.....	.....	John Kenny..	M.	....	25	Head.	Lots 1 and 2, S½ of NE¼, N½ of NE¼ of SW¼ and SW¼ of NE¼ of SW¼ of.	1	22	9	190	09	.....	.....	.....	

NOTE.—Initials heading the column of "Area reserved for railroad purposes" designate railroad companies as follows: "M., K. & T." designates Missouri, Kansas & Texas Railway Company; total area reservation, 254.08 acres. "M. V." designates Midland Valley Railroad Company; total area reservation, 131.32 acres. "A., T. & S. F." designates Atchison, Topeka & Santa Fe Railway Company; total area reservation, —— acres.

We, the undersigned, comprising the Osage Allotting Commission, hereby certify the final division of lands as shown on the attached and foregoing schedule, embracing pages Nos. 1 to 183, both inclusive, was made for the Osage Indians, and that the said lands were duly allotted to them by us in the capacity of the Osage Allotting Commission, and that the said final division was made in conformity to the provisions of the act of Congress approved June 28, 1906 (34 Stat. L., 539), and the instructions of the Commissioner of Indian Affairs of August 4, 1906.

Done at Pawhuska, Oklahoma, this 29th day of March, 1909.

CHAS. E. McCHESNEY,
Chairman.

CASSIUS R. PECK,
Commissioner.

BLACK { his mark } DOG,
Commissioner.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, Aug. 2, 1909.

The annexed and foregoing schedule of final division of lands of the Osage Indians, made in accordance with the provisions of the act of Congress of June 28, 1906 (34 Stat. L., 539), is respectfully submitted to the Secretary of the Interior with the recommendation that it be approved.

F. H. ABBOTT,
Assistant Commissioner.

Witnesses:
WILLIAM PRYOR,
ROY R. MASSEY.

DEPARTMENT OF THE INTERIOR,
Washington, Aug. 2, 1909.

Agreeably to the recommendation of the Commissioner of Indian Affairs, the annexed and foregoing schedule of final division of lands of the Osage Indians, made in accordance with the provisions of the act of Congress of June 28, 1906 (34 Stat. L., 539), is hereby approved, and the Commissioner of Indian Affairs is hereby directed to cause deeds to be executed to the allottees therein named, conformably with the provisions of said act of Congress.

FRANK PIERCE,
Acting Secretary.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, Jan. 13, 1919.

I, E. B. Meritt, Assistant Commissioner of Indian Affairs, do hereby certify that the papers hereto attached are true copies of the originals as the same appear on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed on the day and year first above written.

[SEAL.] E. B. MERITT,
Assistant Commissioner.

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INDEX.

	Page
Statement	1-2
Propositions	2-3
Argument	4

I.

The court has no jurisdiction for want of a Federal question, and motion to dismiss should be sustained	4-11
No Federal question raised or presented	4
Question of State law	6
Whether lands allotted before or after death immaterial	7
Whether parties full-bloods or mixed-bloods immaterial	7
Whether Laban Miles is surviving husband not a Federal question	7
Questions of fact not reviewed by Federal Supreme Court	8
Only rights claimed by petitioner	9
Decision of State court plainly right	10

II.

The district courts of Oklahoma have jurisdiction to determine heirs in partition suits and in suits to quiet title and in suits for possession of real property when necessary to ascertain and determine the interest and ownership of the parties to such suits, when the land sought to be partitioned, the title quieted, or possession gained has been acquired by the parties by descent, and especially where the question of heirship is dependent upon the validity or invalidity of a marriage	11-16
Cases where Oklahoma district court has determined heirs and affirmed by Federal Supreme Court	14
Judgment of district court in partition suit is a final judgment and may be appealed from	15

III.

That the judgment rendered by the district court of Osage County, Oklahoma, in the partition suit of Laban Miles *versus* John Kenny, wherein the validity of the marriage	

Page

of Laban Miles and said Lah-tah-sah, deceased, was in issue, was litigated and decided, and in which the district court decided that Laban Miles, as the surviving husband, was an heir of said Lah-tah-sah, and as such inherited an undivided one-half interest in her estate, was, and is, final and conclusive between the parties, and no appeal having been taken the same became and is *res adjudicata* 16

(*a*) Because under section 6 of the act of Congress approved April 18, 1912 (37 Stat. L., 86), the judgment, determining the interests and ownership of the parties to the land involved, is not required to be approved by the Secretary of the Interior. It is only the partition, or actual division of the land, in case of a partition in kind, or the sale in case partition in kind cannot be made, that is subject to the approval of the Secretary. In case of a sale the deeds evidencing the sale are submitted to the Secretary of the Interior for his approval. In case of a partition in kind the schedule of partition or division must be submitted to the Secretary for his approval, in case of restricted lands, but not the judgment of the court under which a partition or sale may be had..... 16

(*b*) Because in the case at bar the lands involved are not restricted lands, and neither the judgment, nor the partition, nor the sale need the approval of the Secretary of the Interior..... 20

Lands involved not restricted lands..... 25

Osage division act complete within itself..... 35

Res adjudicata 39

Appendix A 42

CASES CITED.

Barnett vs. Way, 29 Okla., 780..... 13

Bilby vs. Brown, 34 Okla., 738..... 14

Bledsoe vs. Wortham, 35 Okla., 261..... 25

Bove vs. Graham, 89 Mo., 20..... 40

Brady vs. Sizemore, 235 U. S., 441 (Affirming 33 Okla., 169)... 14

Bruner vs. Sanders, 26 Okla., 676..... 15

Buck vs. Branson, 34 Okla., 807..... 15

Buttler vs. Buttler, 58 N. Y. Supp., 1049..... 40

	Page
California Powder Works vs. Davis, 151 U. S., 389	9
Carney vs. Chapman, 247 U. S., 102	4
Chappel vs. Bradshaw, 128 U. S., 132	9
Clarkson vs. Washington, 38 Okla., 4	15
Coachman vs. Sims, 36 Okla., 536	14
Clapp vs. Bromagham, 9 Cow., 530	40
De Graffenreid vs. Iowa Land & Trust Co., 20 Okla., 687	13
Divine vs. Harmon, 30 Okla., 820	13
Fenrow vs. Jones, 34 Okla., 694	15
Finley vs. Catchcart, 149 Ind., 470	40
French vs. Hopkins, 124 U. S., 524	9
Ground vs. Dingman, 33 Okla., 760	14, 15
Hancock vs. Mutual Trust Co., 24 Okla., 391	33
Heick vs. Reinheimer, 105 N. Y., 470	40
Hancock vs. Lopez, 53 Cal., 662	40
Hill vs. Hill (Okla.), 160 Pac., 1116	14
Hooks vs. Kennard, 28 Okla., 457	15
Hughes vs. United Pipe Lines, 20 N. Y. St. Rep., 564	40
Irvine vs. Buckles, 148 Ind., 389	40
Irving vs. Diamond, 23 Okla., 325	13
John vs. Pullian, 231 U. S., 583	11
King vs. West Va., 216 U. S., 92	8
Kramer vs. Friday, 10 Wash., 621	40
Lindell R. E. Co. vs. Lindell, 142 Mo., 61	40
Lamb vs. Baker, 27 Okla., 739	15
Leeper vs. Texas, 139 U. S., 462	9
Levindale Lead & Zinc Mining Co., 241 U. S., 432	28
Libby vs. Clark, 118 U. S., 250	37
McDougal vs. McKay, 237 U. S., 372 (Affirming 43 Okla., 261)	14
Morley vs. Fewell, 22 Okla., 452	14
Morrill vs. Morrill, 20 Or., 96	40
Mullen vs. United States, 224 U. S., 448	30, 31, 39
Oklahoma Oil Co. vs. Bartlett, 236 Fed., 488	19
Oxley Stave Co. vs. Butler Co., 166 U. S., 648	9
Parker vs. McClain, 237 U. S., 469	10
Parkison vs. Skelton, 33 Okla., 261	25
Pigeon vs. Buck, 237 U. S., 386 (Affirming 38 Okla., 101)	14
Reed vs. Welty, 197 Fed., 419	30, 31
Rentie vs. McCoy, 35 Okla., 77	30
Reynolds vs. Fewell, 34 Okla., 112	15
Roth vs. Ehman *et al.*, 17 Otto, 319; 27 L. Ed., 499	7
Skelton vs. Dill, 235 U. S., 206	22, 26
Sanders vs. Sanders, 28 Okla., 59	15
Sizemore vs. Brady, 235 U. S., 441	21

	Page
Spies vs. Illinois, 123 U. S., 131	9
Spies vs. Illinois, 123 U. S., 574	10
Shellenbarger vs. Fewell, 34 Okla., 78	15
State *ex rel.* Mose vs. District Court, Okla., 149 Pac., 240	15
Texas & P. R. Co. vs. Southern P. Co., 137 U. S., 48	9
Telleride Power Trans. Co. vs. Rio Grande Western R. R. Co., 187 U. S., 659	10
Trusket *et al.* vs. Closser, 198 Fed., 835	19
Waters Pierce Oil Co. vs. Texas, 212 U. S., 159	8
Washington vs. Miller, 235 U. S., 422 (Affirming 34 Okla., 259)	11, 14
Welty vs. Reed, 231 Fed., 930	22, 23
Woodward vs. De Graffenreid, 238 U. S., 284 (Affirming same in 36 Okla., 81)	14, 21, 23
Whittemore vs. Shaw, 8 N. H., 397	40
Warren vs. Canard, 30 Okla., 514	15

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 179.

JOHN KENNY, PETITIONER,

vs.

LABAN MILES AND JOHN L. BIRD, ADMINISTRATOR OF THE ESTATE OF LAH-TAH-SAH, DECEASED OSAGE INDIAN, ROLL NO. 256.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF FOR RESPONDENT LABAN MILES.

Statement.

The statement of Mr. Solicitor General King and Mr. Assistant Attorney General Kearful in their brief for the petitioner is, in the main, correct, *except* the statement near the bottom of page 3 that, "Pending the partition suit in the district court, the administration in the county court was

suspended." We controvert this statement, and say that the probate proceeding in the county or probate court was begun July 8, 1912 (Printed R., 4), and has been continuously pending ever since, first in the County Court of Osage County, Oklahoma, then on appeal to the District Court of Osage County, Oklahoma, then on appeal to the Supreme Court of Oklahoma, and now before this honorable court on writ of certiorari.

On February 28, 1913, respondent herein, Laban Miles, as plaintiff, filed a partition suit against the petitioner herein, John Kenny, as defendant therein, for the partition of about 660 acres of land deeded on behalf of Lah-tah-sah, deceased, under the provisions of an act of Congress approved June 28, 1906 (34 Stat. L., 539); (Printed R., 49-50). The two cases ran concurrently in the two courts of original jurisdiction. The district court judgment, pleaded as *res adjudicata* in the county court, was rendered on May 31, 1913 (Printed R., 52), and pleaded in the county court February 28, 1914, three months after the expiration of the six months' period in which an appeal might have been taken from the district court judgment in the partition suit.

We also wish to controvert the statement on page 8 of petitioner's brief that the finding of the Supreme Court of Oklahoma that "the lands were selected and patented in her name subsequent to her death" (meaning Lah-tah-sah, deceased) was contrary to the record. We will cite authorities on this proposition in our argument.

Propositions.

1. We insist that the court has no jurisdiction for want of a Federal question, and have filed a motion to dismiss for that reason. (Appendix A.)

2. That the district courts of Oklahoma have jurisdiction to determine heirs in partition suits and in suits to quiet title and for possession when necessary to ascertain and de-

termine the interest and ownership of the parties to such suits, when the land sought to be partitioned, the title quieted, or possession gained, has been acquired by the parties by descent, and especially where the question of heirship is dependent upon the validity or invalidity of a marriage.

3. That the judgment rendered by the District Court of Osage County, Oklahoma, in the partition suit of Laban Miles *versus* John Kenny, wherein the validity of the marriage of Laban Miles and said Lah-tah-sah, deceased, was in issue, was litigated and decided, and in which the district court decided that Laban Miles, as the surviving husband, was an heir of said Lah-tah-sah, and as such inherited an undivided one-half interest in her estate, was, and is, final and conclusive between the parties, and no appeal having been taken the same became and is *res adjudicata.*

(*a*) Because under section 6 of the act of Congress approved April 18, 1912 (37 Stat. L., 86), the *judgment,* determining the interests and ownership of the parties to the land involved, is not required to be approved by the Secretary of the Interior. It is only the *partition,* or actual *division* of the land, in case of a partition in kind, or the *sale* in case partition in kind cannot be made, that is subject to the approval of the Secretary. In case of *a sale* the deeds evidencing the sale are submitted to the Secretary of the Interior for his approval. In case of *a partition in kind* the *schedule of partition or division* must be submitted to the Secretary for his approval, in case of restricted lands, but *not* the *judgment* of the court under which a *partition* or *sale* may be had.

(*b*) Because in the case at bar the lands involved are not restricted lands, and neither the judgment, nor the partition, nor the sale need the approval of the Secretary of the Interior.

ARGUMENT.

I.

The court has no jurisdiction for want of a Federal question, and the motion to dismiss should be sustained.

No Federal Question Raised or Presented.

No Federal question is presented in the record. The only question litigated, or sought to be litigated, by petitioner, John Kenny, at any time, or in any action, is the question of the marriage of his mother, Lah-tah-sah, and the respondent, Laban Miles. If Laban Miles was the surviving husband of Lah-tah-sah, he was an heir. Section 6895 of Wilson's Revised and Ann. Statutes of Oklahoma, then in force, provides *inter alia* for descent in the following manner:

> "First: If the decedent leave a surviving husband or wife, and only one child or the lawful issue of one child, in equal shares to the surviving husband or wife, and child, or issue of such child."

This statute was made applicable to deceased members of the Osage tribe of Indians by section 6 of the Osage division act, *supra,* which provides:

> "Sec. 6. That the lands, moneys, and mineral interests, herein provided for, of any deceased member of the Osage tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or of the State in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband, nor wife, in which case said lands, moneys and mineral interests must go to the mother and father equally" (35 Stat. L., 545).

Carney *vs.* Chapman, 247 U. S., 102, is a case where the validity of an Indian marriage was involved as determining

heirship. The opinion was handed down May 20, 1918, and Mr. Justice Homes speaking for the court said *inter alia:*

> "If any Federal question is presented in this case it arises under the act of Congress of May 2, 1890, chap. 182, section 38, 26 Stat. at L., 81, 89, by which all marriages theretofore 'contracted under the laws or tribal customs of any Indian nation' located in the Indian territory, are declared valid. The date of the supposed marriage was in 1887, and therefore, if it complied with the terms of the act, it was validated if not valid before. The plaintiff in error, after asking instructions as to what constituted a common-law marriage that were given in substance, asked for another that a common-law marriage was not recognized by the Chickasaws, and that a marriage of Chickasaws without a compliance with their laws was void. Taking all the requests for rulings and the rulings together we are inclined to agree with the court below that common-law marriage and marriage under the customs of the tribe were used as equivalent phrases, and to assume in favor of the plaintiff in error that the request means that a marriage of Chickasaws, although in accord with their customs, was invalid under a Chickasaw Act of October 12, 1876, unless solemnized by a judge or ordained preacher of the Gospel. This assumption would seem to carry with it the implication that the act of Congress did not validate a marriage in accordance with still prevailing custom if no judge or preacher added his sanction, and so to ask a construction of that act that, again by implication, was refused."
>
> "In this somewhat remote way a Federal question is opened, but it cannot profit the plaintiff in error. There was some evidence that Charles Puller and Louisa James held themselves out as man and wife and were reputed married. There was evidence also that it was customary to disregard solemnization before a judge or preacher. It would be going somewhat far to construe the Chickasaw statute as purporting to invalidate marriages not so solemnized. The act of Congress made valid marriages under either custom or law."

In the case at bar there is no act of Congress that bears in any way upon the marriage of Laban Miles and his wife, Lah-tah-sah. The act of May 2, 1890, *supra*, has no application, because the Osage Nation became a part of Oklahoma Territory in 1889 and was not a part of the Indian Territory in 1890, when the act was passed, and the marriage in question took place in 1907.

Question of State Law.

Whether Laban Miles is a legal heir of Lah-tah-sah is to be determined by State law exclusively, and is not a Federal question. Whether Laban Miles is such heir depends solely upon the question as to whether he was married to, and the surviving husband of Lah-tah-sah. This in turn is governed exclusively by State law, and is not a Federal question. No other question was raised by John Kenny in his objections to the administrator's final account in the probate court. No other question was raised on appeal from the probate court to the District Court of Osage County, Oklahoma. No other question, other than as to local procedure, was raised, or presented on appeal to the State Supreme Court. The sole object and purpose of John Kenny was to establish himself as the sole heir of his mother, Lah-tah-sah, even though to do so would brand her as an adulteress. In his petition in error to the State Supreme Court his allegations of error in the main are that the trial court erred in "adjudging and decreeing that the final account" of the administrator "be approved." (Not a Federal question.) And erred in "adjudging and decreeing that said Laban Miles was the surviving husband, and one of the heirs." (Not a Federal question.) And erred in "distributing the estate" * * * "one-half to the said Laban Miles and one-half to the plaintiff in error," John Kenny. (Not a Federal question.)

Whether Lands Allotted Before or After Death Immaterial.

Whether the lands involved were allotted and deeded to Lah-tah-sah as grantee in her lifetime, or to her heirs after her death; or whether the lands involved were restricted or unrestricted as to alienation have nothing whatever to do with the question as to whether said Laban Miles was the surviving husband of Lah-tah-sah, deceased, and thereby an heir.

Whether Parties Full-bloods or Mixed-bloods Immaterial.

Also whether Lah-tah-sah, Laban Miles, and John Kenny was, or are, full-blood or mixed-blood Osage Indians, or whether a certificate of competency has been issued to either of them, has nothing to do with the question as to whether Laban Miles was, or is, the surviving husband of Lah-tah-sah, deceased, and thereby an heir.

Again, by neither the manner in which, nor the procedure by which a State court decides a purely State question, governed solely by State law, and where there is no adverse citizenship, can a Federal question be raised or involved.

Whether Laban Miles is Surviving Husband Not Federal Question.

In *Roth vs. Ehman et al.*, 17 Otto, 319; 27 L. Ed., 490, the full decision of this honorable court reads as follows:

> "The only question in this case, controverted below, was whether Madelaine Roth, the plaintiff in error, was the widow of John George Roth, deceased, and that depended entirely on the validity of the decree of the Royal Matrimonial Court of Elwangen, in the Kingdom of Wurtemburg, annulling the marriage of the parties. The Supreme Court of Illinois decided in favor of the Wurtemburg decree, and consequently, that the plaintiff in error was not the widow of the decedent and not entitled to dower in his

estate, or to inheritance under the laws of Illinois. This presents no question of which we can take cognizance under section 709 of the Revised Statutes. No right, title, privilege or immunity which could be claimed under the authority of the United States was involved, and the validity of no treaty or statute of, or any authority exercised under the United States was drawn in question. Neither was there any statute or authority of the State relied on, which was in conflict with the Constitution, treaties or laws of the United States.

"The motion to dismiss for want of jurisdiction is granted."

Also:

"The question of the true construction of a will depends wholly upon general rules of law and upon the local statutes, and in no degree upon the Constitution, laws or treaties of the United States." *Giles vs. Little*, 134 U. S., 645; 33 L. Ed., 1062.

Whether Laban Miles was the surviving husband of Lah-tah-sah was a question of fact to be determined by the State court only, and under the State law applicable to the facts.

Questions of Fact Not Reviewed by Federal Supreme Court.

The Supreme Court of the United States has no power under section 237, R. S., to review a finding of fact by a State court, even though the finding determines whether or not a Federal question is presented. *King vs. W. Va.*, 216 U. S., 92; 54 L. Ed., 396; *Waters-Pierce Oil Co. vs. Texas*, 212 U. S., 159; 43 L. Ed., 770.

"The Supreme Court will not review a final State-court judgment, even if it denies some title, right, privilege, or immunity of the unsuccessful party, unless it appears from the record that such title, right, privilege, or immunity was 'specially set up' or claimed and denied in the State court as belonging to such party under the Constitution or some treaty,

statute, commission, or authority of the United States." *F. G. Oxley Stave Co. vs. Butler County,* 166 U. S., 648; 41 L. Ed., 1149.

"To give the Supreme Court of the United States jurisdiction to review a judgment of a State court because of its denial of a right, title, privilege, or immunity claimed under the Constitution, or any law or treaty of the United States, it must appear of record that such 'right, title, privilege, or immunity' was 'specially set up' or claimed at the proper time and in the proper way." *Texas & P. R. Co. vs. Southern P. Co.,* 137 U. S., 48; 34 L. Ed., 614; *California Powder Works vs. Davis,* 151 U. S., 389; 38 L. Ed., 206; *French vs. Hopkins,* 124 U. S., 524; 31 L. Ed., 536; *Spies vs. Illinois,* 123 U. S., 131; 31 L. Ed., 80; *Chappell vs. Bradshaw,* 128 U. S., 132; 32 L. Ed., 369; *Leeper vs. Texas,* 139 U. S., 462; 35 L. Ed., 225.

Only Right Claimed by Petition.

The only right claimed by petitioner, John Kenny, was the right which he claimed to relitigate the question of the marriage of his mother, Lah-tah-sah, and the respondent, Laban Miles, when the matter came up in the county or probate court, on the final account of the administrator for determination of heirs. This claim involved no "right, title, privilege, or immunity claimed under the Constitution, or any treaty or statute" of the United States. The judgment pleaded as *res judicata* was a State judgment, based on State law governing judgments rendered in actions for the partition of real estate, and whether the State court was right or wrong in sustaining the plea of *res judicata* it was purely a matter of local law and local practice. The admission of the former judgment in evidence in a matter triable only in a State court and under State law was a denial of no Federal right and raised no Federal question.

"A decision against a right set up under U. S. Rev. Stat., sec. 2339, providing for the protection of vested water rights, is not involved in a judgment of a State court denying such rights, which rest solely upon a

decision upon questions of fact or local law upon which rights under that section depend." *Telleride Power Trans. Co. vs. Rio Grande Western R. Co.*, 187 U. S., 659; 47 L. Ed., 307.

Decision of State Court Plainly Right.

"If it appears that the decision of the Federal question was so plainly right as not to require argument, the writ should not be allowed." *Spies vs. Illinois.* 123 U. S., 574; 28 L. Ed., 1084.

"A Federal question which rests upon an obviously false assumption is so plainly devoid of merit as to afford no basis for the exercise by the Federal Supreme Court of its appellate jurisdiction over a State court." *Parker vs. McClain*, 237 U. S., 469; 59 L. Ed., 1051.

If the judgment of the district court pleaded as *res adjudicata* was for any reason not a final judgment, or not a judgment between the same parties, or if its subject-matter was so different as not to constitute a bar to a subsequent action, then the judgment would not be admissible in evidence in support of the plea. But whatever the defect, if any, its admission in evidence, if error, would not raise a Federal question. Suppose the judgment offered in evidence as a bar to a relitigation of the marriage in question had been rendered in an action between Laban Miles and a former husband of Lah-tah-sah in a contest as to which was the surviving husband, and John Kenny had not been made a party and took no part in the proceedings, and such a judgment had been pleaded in the probate proceedings as a bar to the claim of John Kenny as the sole heir, and erroneously admitted in evidence and the plea of *res adjudicata* sustained. John Kenny would have had his right of appeal in the State courts, but no Federal question would have been raised, but merely a question under the State law as to the admissibility of the same in evidence.

The contention that the petitioner is not estopped

or barred by the former adjudication does not present a Federal question. *John vs. Pullian*, 231 U. S., 583; *Washington vs. Miller*, — U. S., —; 59 Law Ed., 295.

II.

The district courts of Oklahoma have jurisdiction to determine heirs in partition suits and in suits to quiet title and in suits for possession of real property when necessary to ascertain and determine the interest and ownership of the parties to such suits, when the land sought to be partitioned, the title quieted, or possession gained, has been acquired by the parties by descent, and especially where the question of heirship is dependent upon the validity or invalidity of a marriage.

In the partition suit between the parties to the case at bar, wherein the judgment pleaded as a plea of *res adjudicate* was rendered, the petitioner, John Kenny, as defendant therein, filed an answer and *cross-petition* denying the marriage of his mother, Lah-tah-sah, and Laban Miles and alleging that he was the sole and only heir; that he was in the constructive possession of the lands and the absolute owner of same by inheritance, and that he was entitled to the immediate actual and exclusive possession thereof; that the claim of the plaintiff, Laban Miles, as set out in his petition constituted a cloud upon his (John Kenny's) title. In the prayer of his answer and *cross-petition* he prayed that he be adjudged to be the sole owner of the lands and entitled to the immediate and exclusive possession thereof and that the *title* in and to said lands and every part and portion thereof *be quieted in the defendant* therein (John Kenny) and that the plaintiff, Laban Miles, be adjudged to have no right, title or interest therein (Printed R., 50-51). Thus the very question raised by him and litigated in the district court, is the very question he again tried to litigate in the county court.

We wish to emphasize the fact that the suit in the district

court wherein the judgment pleaded in the case at bar as *res adjudicate* was rendered, was an action for partition on the part of the plaintiff, and an action to *quiet title* and for *possession* on the part of the defendant John Kenny, under his answer and cross-petition, and in which we insist that the district court had jurisdiction to adjudicate the validity or invalidity of the marriage in question as affecting the question of heirship of the surviving spouse, and the ownership of the lands in question sought to be partitioned, and thus the determination of the heirs of said Lah-tah-sah, deceased.

The sections of the Revised Laws of Oklahoma, 1910, on partition of real estate, applicable in the case at bar, as relate to the partition judgment pleaded as *res adjudicata*, are as follows:

> "Sec. 4940. When the object of the action is to effect a partition of real property, the petition must describe the property and the respective interest of the owners thereof, if known."
>
> "Sec. 4941. If the number of shares or interest is known; but the owners thereof are unknown, or if there are, or are supposed to be, any interests which are unknown, contingent or doubtful, these facts must be set forth in the petition with reasonable certainty."
>
> "Sec. 4943. The answers of the defendants must state, among other things, the amount and nature of their respective interests. They may also deny the interests of any of the plaintiffs, or any of the defendants."
>
> "Sec. 4944. After the interests of all the parties shall have been ascertained, the court shall make an order specifying the interests of the respective parties, and directing partition to be made accordingly."
>
> "Sec. 4955. The court shall have full power to make any order, not inconsistent with the provisions of this article, that may be necessary to make a just and equitable partition between the parties, and to secure their respective interests."

Section 6 of the act of Congress of April 18, 1912, *supra*, provides in part as follows:

> "That from and after the approval of this act the lands of deceased Osage allottees, unless the heirs agree to partition the same, may be partitioned or sold upon proper order of any court of competent jurisdiction in accordance with the laws of the State of Oklahoma: *Provided*, That no partition or sale of the restricted lands of a deceased Osage allottee shall be valid until approved by the Secretary of the Interior."

Under this, and the preceding sections of the statute quoted, we think that this court in a partition suit not only has jurisdiction to, but must make an order specifying the interests of the respective parties and direct that partition be made accordingly, as required by section 4944, which would authorize the determination of heirship where ownership was acquired by inheritance. Section 4955 authorizes the court to make any order that may be necessary to make a just partition between the parties and to secure their respective interests. That this is the rule in other States, see the following:

> "Any court assuming jurisdiction of the proceeding for partition must undertake to determine to whom the estate of the decedent has passed either by inheritance or devise."
> 30 Cyc., 198, and note 40.

That this is the law in Oklahoma is established by the following cases in which the district court decided questions of heirship in partition suits:

Irving vs. Diamond, 100 Pac., 557; 23 Okl., 325.
De Graffenreid vs. Iowa Land & Trust Co., 20 Okl., 687; 95 Pac., 624.
Barnett vs. Way, 29 Okl., 780; 119 Pac., 418.
Divine vs. Harmon, 30 Okl., 820; 121 Pac., 219.

Bilby vs. Brown, 34 Okl., 738; 126 Pac., 1024.
Coachman vs. Sims, 36 Okl., 536; 129 Pac., 845.
Hill vs. Hill, — Okl., —; 160 Pac., 1116.

There is no more reason why the district court has authority to pass on disputed questions of heirship in actions to quiet title, actions in ejectment, and actions to declare a resulting trust, than in partition actions. The following are some of the Oklahoma cases where the district court decided contested questions of heirship:

Cases Where Oklahoma District Court Has Determined Heirs Affirmed by Federal Supreme Court.

Washington vs. Miller, 34 Okl., 259; 129 Pac., 58, affirmed *Washington vs. Miller,* 235 U. S., 422; 59 L. Ed., 295. (To quiet title.)

Woodward vs. De Graffenreid, 36 Okl., 81; 131 Pac., 162, affirmed in 238 U. S., 284; 59 L. Ed., 1310. (Ejectment.)

Brady vs. Sizemore, 33 Okl., 169; 124 Pac., 615, affirmed in 235 U. S., 441; 59 L. Ed., 308. (To determine question of heirship.)

McDougal vs. Mckay, 43 Okl., 261; 142 Pac., 987; affirmed in 237 U. S., 372; 59 L. Ed., 1001. (To determine heirs of Creek infant enrolled after death.)

Pigeon vs. Buck, 38 Okl., 101; 131 Pac., 1983, and *Roberts vs. Underwood,* 38 Okl., 376; 132 Pac., 673, consolidated and affirmed in 237 U. S., 386; 59 L. Ed., 1007. (To quiet title.)

Other Oklahoma Cases.

Ground vs. Dingman, 33 Okl., 760; 127 Pac., 1078. (Quiet title.)

Morley vs. Fewell, 22 Okl., 452; 122 Pac., 700. (Quiet title.)

Warren vs. Canard, 30 Okl., 514; 120 Pac., 599. (Quiet title.)
Shellenberger vs. Fewell, 34 Okl., 79; 124 Pac., 617. (Ejectment and quiet title.)
Hooks vs. Kennard, 28 Okl., 457; 114 Pac., 744. (Ejectment.)
Sanders vs. Sanders, 28 Okl., 59; 117 Pac., 338. (Ejectment.)
Cyr vs. Walker, 28 Okl., 281; 116 Pac., 931. (Ejectment.)
Clarkson vs. Washington, 38 Okl., 4; 131 Pac., 935. (Ejectment.)
Buck vs. Branson, 34 Okl., 807; 127 Pac., 436. (Ejectment.)
Bruner vs. Sanders, 26 Okl., 676; 110 Pac., 730. (Ejectment.)
Lamb vs. Baker, 27 Okl., 739; 117 Pac., 189. (Ejectment.)
Reynolds vs. Fewell, 34 Okl., 112; 124 Pac., 623. (Ejectment.)
Ground vs. Dingman, 33 Okl., 760; 127 Pac., 1078. (Ejectment.)
Fearnow vs. Jones, 34 Okl., 694; 126 Pac., 1015. (To declare resulting trust.)

Judgment of District Court in Partition Suit is a Final Judgment and May Be Appealed From.

The judgment and decree of partition fixed the interests and ownership of the lands involved in the parties to the action, who are the same parties to the case at bar. No appeal was taken, and time in which an appeal might have been taken had expired when the plea of *res adjudicata* was filed. An appeal could have been taken prior to sale. In *State ex Rel. Mose vs. District Court,* not yet officially reported, 149 Pac., 240, the Supreme Court of Oklahoma said:

> "There is no question but what an appeal from a decree of partition lies from the district court to this

> court. * * * The purchaser at the sheriff's sale, if it should go to that extent, would have notice of the appeal, and therefore could not be an innocent or protected purchaser."

In the case just quoted from, a writ of prohibition was sought to prevent the District Court of Marshall County, and the presiding judge thereof from entering an order determining the interests of all parties and partitioning certain real estate belonging to full-blood Mississippi Choctaw Indians, on the ground that the lands were restricted Indian lands and that the court had no jurisdiction to partition same. The writ was denied, the court holding that an appeal was a proper and adequate remedy, and that when an appeal will lie from the judgment about to be rendered a writ of prohibition will not lie.

The petitioner herein likewise had a remedy by appeal from the judgment of the district court in the partition suit, and after the time expired in which an appeal could have been taken, the judgment became *res judicata* and was a good plea in bar in the subsequent proceedings.

III.

The judgment rendered by the District Court of Osage County, Oklahoma, pleaded and proven as *res adjudicata* in the case at bar in the probate court, was and is final and conclusive between the parties, and no appeal having been taken the same became and is *res adjudicata.*

(*a*) Because under section 6 of the act of Congress approved April 18, 1912 (37 Stat. L., 86), the *judgment,* determining the interests and ownership of the parties to the land involved, is not required to be approved by the Secretary of the Interior. It is only the *partition* in kind, or the actual *division* of the land, in case of partition or division in kind, or the *sale,* in case partition in kind cannot be made, that is subject to the approval of the Secretary.

Where the lands sought to be partitioned are *restricted*

lands of a deceased Osage *allottee,* in case of *a sale* the deeds evidencing the sale are submitted to the Secretary of the Interior for his approval. In case of a *partition,* in kind, the *schedule of partition, or division,* must be submitted to the Secretary for his approval, but *not* the *judgment* of the court under which a *partition* or *sale* may be had.

The lands involved in the case at bar are *unrestricted,* but if they were restricted the judgment of the court fixing the rights and determining the interests and ownership of the parties does not require, and could not be affected by, the approval or disapproval of the Secretary of the Interior. The judgment of the court rendered in a partition suit is very similar to a judgment rendered in a proceeding to foreclose a real estate mortgage. The judgment in a foreclosure suit fixes the rights of the parties, determines the ownership in the lands if brought in question, establishes priority of liens and orders the lands sold on condition that payment be not made within a time stated. In the event of a sale same is conducted by the sheriff, and although a judicial sale, the acts of the sheriff are ministerial.

The judgment of the court in a partition suit fixes the rights of the parties, determines the ownership of the lands if brought in question, determines the number of shares and the amount of each, establishes priority of liens if any, and orders the lands sold on condition that same cannot be divided or partitioned in kind. In the event of sale, same is conducted by the sheriff as in the case of the sale of lands upon execution. While such sale is a judicial sale, the acts of the sheriff therein are ministerial, and the deed of the sheriff by which such sale is consummated might by law be made subject to the approval of the Secretary of the Interior or the Auditor of State, if a check upon the sheriff was desired in such matters. If the lands are divided or partitioned in kind, this is done by three commissioners appointed for that purpose. Their acts in dividing the lands and reporting such division are ministerial and might by law be made subject to the approval of the Secretary of the Interior, or

the Auditor of State. But not so as to the *judgment of the court* by which the rights of the parties, their ownership and interests in the lands are adjudicated. From such a judgment an appeal lies to the State Supreme Court. And if a Federal question be involved, a further appeal would lie to the Federal Supreme Court. If such a judgment of the trial court is subject to approval of the Secretary of the Interior, then the judgment of the State Supreme Court on appeal, and the judgment of the United States Supreme Court on further appeal involving a Federal question would be subject to the approval or disapproval of the Secretary of the Interior. Such is the position taken by the petitioner. It is unthinkable. It would be unconstitutional and disastrous to our system of government, if carried out, to require the solemn judgment of the constituted judiciary of the State courts to be submitted to the Secretary of the Interior for his approval, or for review and reversal by him.

Section 3 of the act of Congress of April 18, 1912, submits the property of the Osage Indians to the probate jurisdiction of the county courts of the State of Oklahoma. By this section the superintendent of the Osage Indian agency is "authorized, whenever the interests of the allottee require, to appear in the county court for the protection of the interests of the allottee." Also in case an Osage estate is being dissipated or wasted "by reason of the negligence, carelessness, or incompetency of the guardian or other person in charge of the estate, the superintendent of the Osage agency, *or the Secretary of the Interior,* or his representative, shall have power, and it shall be his duty to report said matter to the county court" and may "prosecute any remedy, either civil or criminal," at the cost and expense "of the estate of the allottee" or the "person in charge of the estate of the allottee and his surety, *as the county court shall determine.*" Nowhere in this section or elsewhere is the *judgment* of the county court in any matter made subject to the approval of the Secretary of the Interior. Yet the county courts of Oklahoma are inferior to the district courts, and appeals lie

in all probate matters from the county court to the district.

The contention of the petitioner that the power of the District Court of Oklahoma is that of a "Federal agency" is not supported by *Okla. Oil Co. vs. Bartlett,* 236 Fed., 488, 94, nor any of the other cases cited. *Truskett vs. Closser,* 198 Fed., 835, cited by petitioner, is not in point. It is to the effect that the District Court of Washington County, Oklahoma, did not have jurisdiction to confer majority rights on an Indian allottee under twenty-one years of age so as to qualify him to lease or otherwise transfer his allotment, as against a Federal restriction placed upon such minors.

In *Okla. Oil Co. vs. Bartlett, supra,* it is said:

> "The act of Congress of May 27, 1908, 35 Stat. L., 315, that the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land, provided that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of the deceased allottee."

In reference to this act the court further said:

> "The county court, in approving the conveyance by the heirs of a deceased allottee, under the statute of the United States above set forth, does not exercise judicial power conferred by the laws or Constitution of the State of Oklahoma nor any Federal judiciary power."
>
> "The purpose of said act of Congress was to permit lands to be conveyed by full-blood Indian heirs of a deceased allottee with the specific restriction that such conveyances were invalid, unless approved by the county court therein named, and was intended to prevent imprudent sales by this class of Indians."

The action of the court was merely ministerial in the approval of such a *conveyance.* The court had nothing to do with negotiating the sale of such land. This was left to the full-blood Indian. He made his own contract in his indi-

vidual capacity and executed a deed conveying the land, and when this was done such a deed to be valid had to have endorsed thereon the approval of county judge or county court. Not so in a partition suit to partition real estate. There a *suit* is filed, issues are joined between the parties, and these issues are tried and a judgment rendered in a regular judicial proceeding, and the action of the court is judicial and not ministerial.

(*b*) Because in the case at bar the lands involved are not restricted lands, and neither the judgment, nor the partition, nor the sale need the approval of the Secretary of the Interior.

The record shows, and it is admitted by all parties, that Lah-tah-sah, deceased, Osage Roll #256, died intestate August 19, 1908. Had she received her allotments of lands at that time, as contended by petitioner? We say not. The first allotment deed (Printed R., 69) was dated September 23, 1908, but not approved by the Secretary until February 20, 1909. The second allotment deed (Printed R., 67) was dated May 5, 1909, but not approved until July 30, 1909. The sixth subdivision of section 2 of the Osage Division act of June 28, 1906, *supra*, among other things, provides that:

> "The schedules of said selections and division of lands herein provided for shall be subject to the approval of the Secretary of the Interior."

The petitioner, by "Appendix A" of his brief, at page 31, shows that the schedule of the first, second, and third selections was not approved until November 19, 1909. And at page 34 of his brief, by the same "Appendix A," he shows that the schedule of final division was not approved until August 2, 1909. By the approval of the schedules, as shown by petitioner's brief at the pages referred to, deeds were directed to be issued. The deeds when issued and approved could in no event relate back farther than the date of the approval of the schedule of allotments.

The act of June 28, 1906, *supra*, provided for an equitable

division of the lands belonging to the Osage tribe of Indians, giving to each member entitled thereto, or to his heirs, his *pro-rata* share thereof in acres, and provided for the issuance of fee-simple deeds of conveyance, with stated restrictions against alienation. When did a member receive his *pro-rata* share thereof in acres and become an *allottee?*

In *Sizemore vs. Brady,* 235 U. S., 441; 59 L. Ed., 308, this honorable court said:

> "On the part of the maternal cousins it is contended that the provisions in the original agreement relating to the allotment and distribution of the tribal lands and funds were in the nature of a grant *in præsenti,* and invested every living member of the tribe and their heirs, designated in the tribal law, of every member who had died after April 1, 1899, with an absolute right to an allotment of lands and a distributive share of the funds, and that Congress could not recall or impair this right without violating the due process of law clause of the 5th amendment to the Constitution. To this we cannot assent. There was nothing in the agreement indicative of a purpose to make a grant *in præsenti. On the contrary, it contemplated that various preliminary acts were to precede any investure of individual rights. The lands and funds to which it related were tribal property, and only as it was carried into effect were individual claims to be fastened upon them.* (Italics ours.)

Also, in the case of *Woodward vs. De Graffenreid,* 238 U. S., 284; 59 L. Ed., 1310, reading on 1327, the Supreme Court of the United States said:

> "In our opinion the equitable title to the Agnes Hawes allotment was vested in her heirs according to Creek law by the clear meaning of paragraph 28, which says: 'All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled * * * shall be placed upon the rolls * * * and if any citizen had died since that time * * * before receiving his allot-

ment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled if living shall descend,' etc. *Although she had been placed in possession of an allotment, she had not in her lifetime 'received' it, in the sense* of the Agreement, *for this contemplated ownership in fee,* and she had received only a provisional surface right. *Besides, while in paragraph 6 in confirming the allotment brought it under those provisions of the Agreement that contemplated a patent in fee,* it was still only a partial dividend out of the property of the tribe."

In this opinion the court further said:

> "It is perhaps unnecessary to say that the subsequent issue of a patent to the 'Heirs of Agnes Hawes,' without naming them, conveyed the legal title to those persons upon whom the equitable title was conferred by the Original Agreement.
>
> "The restrictions upon alienation contained in the Original Agreement did not apply to allotments made on behalf of deceased members of the tribe. *Skelton vs. Dill,* 235 U. S., 206, 210; *ante,* 198, 200; 35 Sup. Ct. Rep., 60."

Also the Circuit Court of Appeals, Eighth Circuit, in the case of *Welty vs. Reed,* 231 Fed., 930, said:

> "The one and only question involved in the present case is whether the heirs of Thomas Knight had power to alienate the allotment originally made in the name of their father (who died prior to the taking effect of the original Creek allotment) but which was subsequently confirmed by patent in them prior to August 8, 1907, which is the date of the expiration of the five-year period of restriction imposed by the Original and Supplemental Creek Agreements. In other words, do the restrictions of those agreements apply in a case where an allotment was made in the name of a father, who died prior to the Original Creek Agreement and before a patent was issued to him, whose heirs afterwards received the patent directly therefor?

"This case was heard by this court at its December term, 1914, and a decision was reached reversing the judgment of the district court and sustaining the contention of the defendant Welty. *Welty vs. Reed,* 219 Fed., 864; 135 C. C. A., 534. Afterwards, the attention of the court being called to the decision of the Supreme Court in the case of *Woodward vs. De Graffenreid,* 238 U. S., 284; 35 Sup. Ct., 764; 59 L. Ed., 1310, which had not appeared prior to the decision of the present case by this court, we sustained a motion for a rehearing. The Woodward case has now been carefully and critically considered, and in our opinion it presents a case altogether similar in its facts to the case now before us. In it the points now relied upon by opposing counsel in support of their respective contentions in this case were given exhaustive consideration by the Supreme Court, and that court held with the contention of the appellee that *an allotment made to a Creek Indian in his lifetime, who afterwards received a patent for the land, took only a provisional surface right, and that such allottee had not been placed in possession of an allotment, or had not 'received an allotment'* as contemplated by section 7 of the Original Creek Agreement, or section 16 of the Supplemental Creek Agreement, *and that as a result the final allotment and patent made to the heirs of such allottee did not subject them to any of the restrictions against conveyance of their land found in these sections."* (Italics ours.)

The Osage Division act provided a plan, method, or scheme, the main object of which was to divide or "partition" the lands and funds of the Osages, whereby the title of the United States and the Osage tribe of Indians was to be "excluded from the whole" and title of each individual member of the tribe, or his heirs, made "exclusive in a part." This was accomplished by the execution of deeds by the principal chief for the Osages, approved by the Secretary

of the Interior as per section 8 of the Osage Division act which provides:

> "Section 8. All deeds to said Osage lands or any part thereof shall be executed by the principal chief for the Osages, but no such deeds shall be valid until approved by the Secretary of the Interior."

As was said in *Sizemore vs. Brady, supra,* the Osage Division act *contemplated that various preliminary acts were to precede any investure of individual rights. The land and funds to which it related were tribal property, and only as it was carried into effect were individual claims to be fastened upon them.*

The fourth paragraph of section 2 provides *inter alia* with respect to homestead that the "certificate of allotment and deed shall designate the same as a homestead." But no "certificates of allotments" were ever made or issued.

The sixth paragraph of section 2 provides *inter alia* that

> "The schedules of said selections and divisions of lands herein provided for shall be subject to the approval of the Secretary of the Interior."

If certificates of allotment had, in fact, been issued, and if a member could be said to have *received* an allotment upon receipt of such certificate, yet plaintiff in error would not be benefited thereby, because such allotment certificate could not have been issued before the approval of the schedule of *selections* (of members) and *divisions* (of remaining lands by the Commission) by the Secretary of the Interior. The schedule of the first, second, and third selections was not approved by the Secretary of the Interior until November 19, 1908, three months after the death of Lah-tah-sah, and the schedule of "final division" was not approved by the Secretary until August 2, 1909, nearly one year after the death of Lah-tah-sah, who died August 19, 1908.

Only two schedules were made out—one schedule embracing the first, second, and third selections, and the second

schedule embracing the final division of the remaining lands made by the allotting commission.

A joint resolution of February 27, 1909 (35 Stat. L., 1167), provides that homesteads of members of the Osage tribe may consist of land designated of any one or more of the first three allotment selections. This conclusively shows that up to February 27, 1909, the matter of selecting and designating homesteads was yet an open question, and that after February 27, 1909, the homestead might be designated from any one or more of the first three selections. This was six months after the death of Lah-tah-sah.

It is quite manifest that at the time of the death of Lah-tah-sah, August 19, 1908, she had not "received" allotments of land and was not an allottee. In *Parkison vs. Skelton*, 33 Okla., 261, it is said: "The word 'allottees' refers to parties to whom allotment is made."

In *Bledsoe vs. Wortham*, 35 Okla., 261, the Supreme Court of Oklahoma, in construing the act of Congress of April 21, 1904 (33 Stat. L., 189, 204) said:

> "The allotment having been selected, the fact that no patent had issued did not prevent the conveyance of the allottee's equitable estate therein, but when the first deed was executed by Folsum, *he was not an allottee*, not having selected his allotment. Said act sought to take off the restrictions as to certain lands of *allottees*, not to remove restrictions upon distributive shares of *members* of the tribe. Such parties became *allottees only after the lands had been allotted to them*." (Italics ours.)

Lands Involved Not Restricted Lands.

Counsel for plaintiff in error have assumed that the lands involved (in the partition suit of the plaintiff and the suit to quiet title and for possession, based on the answer and cross-petition of the defendant John Kenny, the judgment rendered in which was pleaded as *res adjudicata* in the county court and in the district court on appeal in the probate pro-

ceedings arising on the final account of the administrator) were *allotted* Osage Indian lands burdened with restrictions against alienation. This presumption is, in our judgment, a violent one, and not warranted by either the law or the facts.

Under our first proposition stated above the real question is whether allotments of lands in the Osage Nation which were made on behalf of Lah-tah-sah, deceased, passed their lands to her heirs free from restrictions upon alienation. This is a Federal question. In *Skelton vs. Ditt*, 235 U. S., 206; 59 L. Ed., 198, in stating the Federal question, the court said:

> "Whether an allotment of land in the Creek Nation, which was made on behalf of Archie Hamby, a Creek child, then deceased, passed the lands to his heirs free from restrictions upon alienation, is the Federal question in this case."

There are no restrictions against alienation upon the lands embraced in the Osage Nation except such as were imposed by the act of Congress of June 28, 1906, *supra*. This act provided that all lands were to be *divided* among the members of said tribe, *giving each his or her fair share thereof in acres*. Section 2 of said act provides, *inter alia*:

> "Each member of said tribe, as shown by the roll of membership made up as herein provided shall be permitted to select one hundred and sixty acres of land as a first selection.

The third subdivision of said section 2 provides:

> "After each member has selected his or her first selection as herein provided, he or she shall be permitted to make a second selection of one hundred and sixty acres of land in the manner herein provided for the first selection."

The fifth subdivision of said section 2 provides:

> "After each member has selected his or her first, second, and third selections of one hundred and sixty

> acres of land, as herein provided, the *remaining* lands of said tribe in Oklahoma Territory, except as herein provided, shall be *divided* as equally as practicable among said members by a commission to be appointed to supervise the selection and division of said Osage lands."

After the *first, second, and third* selections were made by or on behalf of each member of the tribe as provided for there were *remaining lands* amounting to one hundred eighty acres to each member, which was divided by the Commission as provided by the section just quoted, and which lands are designated in subdivision 4 of section 2 as *"His share of the remaining lands allotted to the members."*

The fourth subdivision of said section 2 provides *inter alia:*

> "After each member has selected his or her second selection of one hundred and sixty acres of land as herein provided, he or she shall be permitted to make a third selection of one hundred and sixty acres of land in the manner herein provided for the first and second selections.
>
> * * * "Each member of said tribe shall be permitted to designate which of his three selections shall be a homestead, and his certificate of allotment and deed shall designate the same as a homestead, and the same shall be inalienable and non-taxable until otherwise provided by act of Congress. The other two selections of each member, together with his share of the remaining lands allotted to the member, shall be known as surplus land, and shall be inalienable for twenty-five years, except as hereinafter provided."

Stated in the form of a syllogysm, we have:

1. All restrictions are imposed by the provisions of the fourth paragraph of section 2.

2. The provisions of the fourth paragraph of section 2, taken in their natural sense, apply only to allotments made to a member of the tribe (while living).

3. Therefore, only *allotments* made to members of the tribe (as such while living and in their own right), and *not* lands *inherited,* are restricted.

In Levindale Lead & Zinc Mining Co. *vs.* Coleman, 241 U. S., 432, this court in construing said fourth paragraph of sec. 2 said:

> "Taken in their natural sense, the provisions of the fourth paragraph of section 2 apply only to *allotments* made to members of the tribe. There is nothing to suggest that a non-member should designate a 'homestead' and unless lands were thus segregated the restrictions as to 'homesteads' would not apply. With respect to 'surplus lands' it will be observed that it is *only selections of each 'member,' and the share of remaining lands 'allotted to the member,' which constitute lands so described and thus come under the State restrictions.* (*Italics ours.*)

We wish to emphasize the fact that it was only a member living at the time of taking an allotment that could designate land from one or more of *his three* selections as a homestead and that there is no provision for the designation of a homestead by any *living* member of the tribe except that such designation be made from one or more *of his three selections.* In other words, the land authorized to be designated as a homestead must be a selection of one hundred and sixty acres of land allotted to a *living member in his own right* selected from the approved schedule of the first, second, and third selections. And the Supreme Court of the United States in the Levindale Case, *supra,* says: *"And unless lands were thus segregated, the restrictions as to homesteads would not apply."* By the joint resolutions of February 27, 1909 (35 Stat., 1167), it is provided that homesteads of members of the Osage tribe may consist of land designated *from* any one or more of *their three allotment* selections. That is an eighty-acre might be designated from the first selection and an eighty acres from the second selection; but, says the Supreme Court of the United States in the Levindale Case, *supra:* "This does not suggest that non-members were supposed to designate homesteads." We may add that this does not suggest that a member was supposed to designate a home-

stead in his own behalf and another homestead on behalf of deceased ancestor, nor does it suggest that a member may designate a homestead in his or her own behalf and a one-half or a one-third of a homestead on behalf of such deceased ancestor. In other words, the homestead provided for in said act of Congress and on which restrictions against alienation was imposed, was a homestead for the living and not for the dead. If the heir, of a deceased member, be a member of the tribe, he would have a homestead, as such member, in his own behalf and was entitled to no other or further homestead under said act of Congress. If such heir be a *non-member,* he was not entitled to any homestead at all. And, unless one hundred and sixty acres of land were segregated, designated and selected from one or more of *his three selections* as a homestead by a living member of the tribe and allotted and deeded to such living member, as such the restrictions as to homestead would not apply. In the case at bar, Lah-tah-sah died long before any lands were deeded to her and designated no one of the three selections deeded in her behalf as a homestead and no restrictions attached to the lands purported to be deeded to her as a homestead. She died August 19, 1908, the purported homestead deed was dated September 23, 1908, but not approved by the Secretary of the Interior until February 20, 1909, and the schedule of the first, second, and third selections was not approved by the Secretary of the Interior until November 19, 1908, as hereinafter shown.

As to the surplus lands the Supreme Court of the United States in the Levindale case, *supra,* says that "With respect to surplus lands it will be observed that it is only selections of each member and the share of remaining lands allotted to the member, which constitute lands so described *and thus so come under the stated restrictions,*" so that which respect to surplus lands, no restrictions were imposed except as to the *"other two selections* of each member together with *his share of the remaining lands allotted to the member* that come under the stated restrictions." Thus restrictions against alienation were

imposed only as to allotments made to members of the Osage tribe of Indians who were living at the time the lands were allotted and deeded under the provisions of said act of Congress.

Bearing in mind the fact that the allotment and conveyance by allotment deeds of the lands in question were *not* made to said Lah-tah-sah in her lifetime as a living citizen and member of the Osage Tribe of Indians in her own right, she having died prior thereto, we call attention to the case of *Skelton vs. Dill,* 235 U. S., 206; 59 L. Ed., 198, where among other things, it is said:

> "Where these restrictions were intended to apply only to allotments made to living citizens in their own right, or to apply as well to allotments made on behalf of deceased members, is the question for decision. The Supreme Court of the State, when passing upon this case, held (210) them applicable to both classes of allotments, but in the later case of *Rentie vs. McCoy,* 35 Okla., 77; 128 Pac., 244, reached the other conclusion, as did also the district court for the Eastern District of Oklahoma in *Reed vs. Welty,* 197 Fed., 419. We think the better reasoning lies with the view that the restrictions apply only to allotments made to living citizens in their own right. Not only do the provisions of section 16 of the supplemental act lend themselves to that view, but in those sections of both acts which deal with allotments on behalf of deceased persons there is no suggestion of a restriction upon alienation. This difference in legislative treatment doubtless was deliberate, and reflects a corresponding difference in purpose. In *Mullen vs. United States,* 224 U. S., 448; 56 L. Ed., 834; 32 Sup. Ct. Rep., 494, a like question arose under the original and supplemental acts relating to the Choctaw and Chickasaw lands, and we held that the restrictions upon alienation imposed by those acts were applicable to allotments to living members in their own right, but not to allotments on behalf of members then deceased."

There are no provisions in the Osage Allotment act, *supra,*

imposing restrictions upon alienation, and no provision for the designation of a homestead except in allotments deeded to living members.

In the case of *Reed vs. Welty,* 197 Fed., 419, *supra,* the United States District Court for the Eastern District of Oklahoma said:

> "Section 7, of the Original Creek agreement (act, March 1, 1901, c. 676, 31 Stat. 863), and Section 16 of the Supplemental Agreement (act, June 30, 1902, c. 1323, 32 Stat. 503), under which allotments of lands were made, providing that lands allotted to citizens shall not in any case be alienable before the expiration of five years from the ratification of the agreements respectively, did not apply to lands allotted to heirs of an enrolled citizen who died before receiving his allotment, and as to such lands the said agreements imposed no restriction upon the right of alienation."

In the case of *Mullen vs. United States,* 224 U. S., 448; 32 Sup. Ct., 494; 56 L. Ed., 834, this honorable court, *inter alia,* said:

> "It is true that under the Creek agreement, in cases where the ancestor died before allotment, the lands were to be allotted directly to the heirs, while under the Choctaw and Chickasaw agreement the allotment was to be made in the name of the deceased member, and 'descend to his heirs.' This, however, is a merely formal distinction and implies no difference in substance. In both cases the lands were to go immediately to the heirs, and the mere circumstance that, under the language of the statute, the allotment was to be made in the name of the deceased ancestor instead of the names of the heirs furnished no reason for implying a requirement that there should be a designation of a portion of the lands as homestead.
>
> "We have, then, a case where all the allotted lands going to the heirs are of the same character, and there is no restriction upon the right of alienation expressed in the statute. Had the lands been allotted in the lifetime of the ancestor, one-half of them, con-

stituting homestead, would have been free from restriction upon his death. The only difficulty springs from the language of paragraph 16, limiting the right of heirs to sell 'surplus' lands. But, on examining the context, it appears that this provision is part of the scheme for *allotments to living members, where there is a segregation of homestead and surplus lands respectively*. Whatever the policy of such a distinction which gives a greater freedom for the disposition by heirs of homestead lands than of the additional lands, there is no warrant for importing it into paragraph 22, where there is no such segregation. It would be manifestly inappropriate to imply the restriction in such cases so as to make it applicable to all the lands taken by the heirs, and there is no occasion or authority for creating a division of the lands so as to impose a restriction upon part of them. (Italics ours).

"There being no restriction upon the right of alienation, the heirs in the case involved in this appeal were entitled to make the conveyances. The bill alleged that the tracts embraced in these conveyances were 'allotted lands,' and certificates of allotment had been issued. These Indian heirs were vested with an interest in the property which, in the absence of any provision to the contrary, was subject of sale. The fact that they were 'full-blood' Indians makes no difference in this case, for, at the time of the conveyances in question, heirs of the full-blood, taking under the provisions of paragraph 22 of the supplemental agreement, had the same right of alienation as other heirs." * * *

In the Mullen case, *supra*, the Supreme Court of the United States further says:

"While the lands were to be allotted in the name of the deceased they passed at once to his heirs, and as each heir, if a member of the tribe, was already supplied with his homestead of 160 acres, there was no occasion for a further selection for that purpose from the inherited lands. No distinction is made between the heirs; they might or might not be members of the tribe and where there were a number of heirs, each would take his undivided share. It is quite evident

that there is no basis for implying the requirement that in such case there should be a selection of portion of the allotment as a homestead, and all the lands allotted under paragraph 22 are plainly upon the same footing. While it appears from the record that, in the present case, separate certificates of allotment were issued for homestead and surplus lands, this was without the sanction of the statute."

So, in the case at bar, while the lands were allotted and deeded to La-tah-sah subsequent to her death, they passed at once to her heirs. She being dead, and her heirs being members of the tribe, they were each "already supplied with a homestead of 160 acres" and "there was no occasion for a further selection for that purpose from the inherited lands."

In the case of *Hancock vs. Mutual Trust Company,* 24 Okla,. 391; 103 Pac., 566, it is said:

"The Congress of the United States and the members of the different tribes clearly foresaw that the increasing pressure of white people surrounding these nations, crowding over and intermingling with them, rendered a further continuance of their qualified trial independence of the Government of the United States not only impracticable, but also that the friction occasioned by an effort to continue it would work to the deteriment of all parties. Out of this situation grew the conviction that it would be wiser and more conducive to the best interests of all to divide the national wealth among the children of the tribes who were then living and among the heirs of those whose names were upon the roll on a day certain. When this was done, and each had received his portion, then would come a dissolution of the ties which had bound them together as a government, and each with his patrimony would go his separate way. Under the old regime, when a member of the nation dies, his interest in the property of the nation went back to the entire body of the people; but this was not to be under the treaty into which they entered, and which is now before us, for, under it, a roll of the membership of the nation and those who were entitled to participate in its assets was provided for." * * *

In the Hancock case, *supra*, it is pointed out that under the Creek agreement the estate of a deceased member of the Creek tribe passes to the heirs, not under any tribal or Federal act prescribing a limitation upon alienation by the heirs, and in this connection said:

> "It is provided that the heirs shall take under the terms of a separate and specific statute, to-wit, the laws of descent and distribution as provided in chapter 49 of Mansfield's Digest of the Statutes of Arkansas. These laws contain no restrictions on alienation, and the rights of the heirs under them, being recognized by this treaty, carried the property to them free, clear, and unincumbered."

As in the case of the Creeks, all Osages were to participate in the allotment and division of the lands of the Osage Tribe of Indians whose names were on the Osage Tribal roll on a date certain, to wit, January 1, 1906, and children born to such enrolled members between January 1, 1906, and July 1, 1907.

Section 6 of the Osage allotment act, *supra*, provides:

> "That the lands, moneys, and mineral interests, herein provided for, of any *deceased* member of the Osage Tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or of the State in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys, and mineral interests must go to the mother and father equally."

Allotments of land to which a Creek Indian was entitled at the time of death, but which had not been actually allotted, descended to his legal heirs, as stated in the Hancock case, *supra*, in accordance with the laws of descent and distribution as provided in chapter 49 in Mansfield's Digest of the Statutes of Arkansas, which contained no restrictions upon alienation. Consequently the heirs took such inheritance free, clear, and unincumbered of restriction upon alienation.

In like manner, on the death of an Osage Indian whose name was on the tribal roll January 1, 1906, or who was born to such enrolled member between January 1, 1906, and July 1, 1907, such death taking place before allotments were actually made the lands, moneys, and mineral interests of such deceased member descended to his or her legal heirs according to the laws of the Territory or of the State of Oklahoma, as provided in section 6 of the Osage allotment act above quoted. Said section 6 contains no provision imposing restrictions upon alienation of such an inheritance. The laws of Oklahoma put in force by said section 6 contain no limitation or restriction on alienation, and no provision is found in said Osage allotment act imposing a restriction upon alienation of any such lands inherited by the legal heirs of a deceased member of the Osage Tribe of Indians. The lands involved in this case having been allotted and deeded after the death of said Lah-tah-sah there were no restrictions upon the right of alienation, imposed.

Where allotments of land were deeded under the provisions of the Osage allotment act to a member having died prior to receiving his or her allotments, such allotments were taken by the heirs with no restrictions upon such alienation, as such allotments descended to such heirs in accordance with the laws of Oklahoma, which contained no provision imposing a restriction upon alienation. As heretofore pointed out, the Osage allotment act contains no provision imposing restrictions upon alienation except as to such allotments as were deeded to living members of the Osage Tribe of Indians in their own right.

Osage Division Act Complete Within Itself.

The act of Congress, *supra*, is, as its title indicates, *"an act for the division of the lands and funds of the Osage Indians in Oklahoma."* The *"lands* of the Osage Indians" consisted of about one million six hundred thousand acres and the *"funds"* of the Osage Indians consisted of about nine million

dollars deposited in the Treasury of the United States. The act of Congress, *supra*, was NOT an Indian allotment act, but was a DIVISION act, for the *division* or *partition* in severalty among the members of the tribe *"of the lands and funds of the Osage Indians in Oklahoma."*

The last clause of section 1 of said act provides:

> "And the tribal *lands* and tribal *funds* of said tribe shall be equally *divided* among the members of said tribe as hereinafter provided." (Italics ours.)

Section 2 of said act provides:

> "That all *lands belonging* to the Osage tribe of Indians in Oklahoma Territory, except as herein provided, shall be *divided* among the members of said tribe, giving to each *his* or *her* fair share thereof in acres, as follows:" (Italics ours.)

The *first* subdivision of section 4 of said act provides *inter alia*:

> "That all the *funds* of the Osage tribe of Indians, and all the *money* now due or that may hereafter be found to be due to the said Osage tribe of Indians, and all *moneys* that may be received from the sale of their lands in Kansas under existing laws, and all *moneys* found to be due to said Osage tribe of Indians on claims against the United States, after all proper expenses are paid, shall be *segregated* as soon after January first, nineteen hundred and seven, as practicable and placed to the credit of the individual members of said Osage tribe on a basis of a *pro rata division* among the members of said tribe, as shown by the authorized roll of membership as herein provided for, or theirs as hereinafter provided."

Section 8 of said act provides:

> "That all deeds to said Osage lands or any part thereof shall be executed by the principal chief for the Osage, but no such deeds shall be valid until approved by the Secretary of the Interior."

The *division* of the "funds" of the Osage Indians was accomplished by a simple calculation and a change in bookkeeping by which the account of the United States with the Osage tribe of Indians was changed from the tribe to the individual members of the tribe, or their heirs, "on a basis of a *pro rata division*" of THEIR funds.

The final *division* of the "lands of the Osage Indians" was accomplished by the execution, approval, and delivery of *deeds* by which the fee-simple title was conveyed to each member in and to "his or her fair share thereof in acres."

The restriction upon alienation where the deeds were executed and delivered to a member of the Osage tribe of Indians in his lifetime was, and is, not inconsistent with the conveyance of a fee-simple title. On this proposition the Supreme Court of the United States, in *Libby vs. Clark*, 118 U. S., 250; 30 L. Ed., 133, said:

> "The title conveyed to Hurr by the patent was a fee simple: that is, it was all the title or all the interest in the land. No one shared this title, or had any interest in it, and it descended, or would have descended to his heirs. The restrictions on his right to convey did not deprive the title of the character of a fee-simple estate. 'An estate in fee simple is where a man has an estate in lands or tenements to him and his heirs forever.' 4 Comyn's Digest 1, Article, Estate. The limitation of the power of sale for five years is not inconsistent with a fee-simple title."

No restrictions were imposed on any lands of the Osages, for the *division* of which provision was made by the Osage *Division* act, *supra*, except *such* as were imposed by the fourth paragraph of section 2, to wit: The *homestead* must be designated from one or more of the three approved selections made by a member of the tribe and deeded to him or her as such in his or her lifetime. And, in the language of the Supreme Court of the United States, *"Unless lands were thus segregated the restrictions as to homestead would not apply,"* and did not apply in the case at bar.

As to *surplus* lands said fourth paragraph of section 2 provides:

> "The *other two selections* of each member, together with his share of the *remaining lands* allotted to the member, shall be known as *surplus* land, and shall be inalienable for twenty-five years, except as hereinafter provided." (Italics ours.)

In the Levindale case, *supra*, the Supreme Court of the United States said:

> "With respect to *surplus* lands it will be observed that it is only *selections of each member* and the *share of the remaining lands allotted to the member which* constitute lands so designated and thus *come under the stated restrictions.*" (Italics ours.)

It is only *homestead* and *surplus* that any restrictions are imposed upon. In order to assume the character of *homestead* the same *must* be designated and deeded to a living member as such. The *surplus* consists *only* of "*the other two selections of each member, together with his share of the remaining lands allotted to the member.*" It is only lands thus described which constitute *surplus* land and thus *come under the stated restrictions* applicable to *surplus* land.

The lands involved in the case at bar are neither *homestead* nor *surplus*. Had said Lah-tah-sah been living at the time the lands were allotted and deeded she would have had the right to have had the lands in question, or similar lands consisting of a like number of acres allotted and deeded to her as *homestead* and *surplus*, but having died prior thereto the right to such lands, and the lands in question, descended to her legal heirs, not as *homestead* or as *surplus* but merely as inherited lands.

By inadvertence the allotment deeds, although executed long after death of said Lah-tah-sah, were made to run to said Lah-tah-sah as grantee. But this is immaterial.

In *Mullen vs. United States,* 224 U. S., 448; 32 Sup. Ct., 494; 56 L. Ed., 834, the court said:

> "It is true that under the Creek agreement, in cases where the ancestor died before allotment, the lands were to be allotted directly to the heirs, while under the Choctaw and Chickasaw agreement the allotment was to be made in the name of the deceased member, and descend to the heirs. This, however, is a merely formal distinction and implies no difference in substance. In both cases the lands were to go immediately to the heirs, and the mere circumstance that, under the language of the statute, the allotment was to be made in the name of the deceased ancestor instead of the names of the heirs furnished no reason for implying a requirement that there should be a designation of a portion of the lands as homesteads."

Had the allotment deeds in question been required by the statute to run to the deceased member stead of to the heirs, that fact would have made no difference, and the fact that the deeds of allotment were inadvertently made to run to the deceased member instead of the heirs makes no difference, as the lands, moneys, and mineral interests descended immediately upon her death to her heirs under the provisions of section 6 of said Osage *division* act, *supra,* and without restrictions upon alienation.

Res Adjudicata.

We insist that the judgment rendered by the District Court in the partition suit, and pleaded and proven in the case at bar, was final and conclusive on the parties hereto as to the fact of marriage of Laban Miles and Lah-tah-sah.

> "The general policy of the American statutes is to permit the parties in proceedings for partition to present and have determined every material question relating to the title so that, as a result of the proceedings, each person having an allotment made to him and each purchaser acquiring title under a decree of

sale may rest assured that he has acquired the title and interest of every person who has been before the court. All issues may be presented and determined which are necessary to the accomplishment of this result, and the determination, when made, is final and conclusive and none of the parties can maintain any subsequent action or proceeding inconsistent with the determination thus made. *Irvin vs. Buckles,* 148 Ind., 389; 47 N. E., 822; *Finley vs. Catchcart,* 149 Ind., 470; 48 N. E., 586; *Bove vs. Graham,* 89 Mo., 200; 1 S. W., 90; *Lindell R. E. Co. vs. Lindell,* 142 Mo., 61; 43 S. W., 368; *Whittemore vs. Shaw,* 8 N. H., 397; *Clopp vs. Bromaghan,* 9 Cow., 530; *Buttler vs. Buttler,* 58 N. Y. Supp., 1049; *Morrill vs. Morrill,* 20 Or., 96; 25 Pac., 362; 11 L. R. A., 155.

"A judgment upon the ownership of property, where that is a material point in issue, is *res adjudicata* in all subsequent actions between the same parties and their privies, upon the question of ownership. *Hughes vs. United Pipe Lines,* 29 N. Y. St. Rep., 564, and

"Both parties, having consented to litigate, are bound by the judgment. *Helck vs. Reinheimer,* 105 N. Y., 470.

In *Kromer vs. Friday,* 10 Wash., 621; 32 L. R. A., 671, it is said:

"Partition is a civil action, in contemplation of our code, and may be used as a form of action to try title. The rights of the several parties, plaintiffs as well as defendants, may be put in issue, tried and determined in such suit, and

"The determination of the fact of title by the court is held to be conclusive upon all the parties to the suit. *Hancock vs. Lopez,* 53 Cal., 362-371.

"A judgment in partition is conclusive upon all persons having any interest who were made parties to the proceeding, including persons summoned by publication only, persons duly cited as 'unknown owners,' infants and married women, and those having contingent or expectant interests or possibilities, even though not *in esse,* if represented on the record by the person entitled to the first estate of inheritance. 23 Cyc., 1334."

"On the question of *res adjudicata* it is immaterial that the questions alleged to have been settled by a former adjudication were determined in a different kind of proceeding or a different form of action from that in which the estoppel is set up, the parties and the issues being the same." 23 Cyc., 1221.

Conclusion.

In conclusion, we submit that this court has no jurisdiction, and that the case should be dismissed. But should the court hold it has jurisdiction, then we submit that the judgment of the Supreme Court of Oklahoma holding that the District Court had jurisdiction and its judgment was final in the partition suit, because: *First,* the judgment did not need approval by the Secretary of the Interior to give it finality; and, *Second,* the lands involved were *not restricted* lands of a deceased Osage *allottee,* and the judgment should be affirmed.

Respectfully submitted,

H. P. WHITE,
Attorney for Respondent, Laban Miles.

APPENDIX "A."

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 179.

JOHN KENNY, *Petitioner,*

vs.

LABAN MILES AND JOHN L. BIRD, *Administrator of the Estate of Lah-tah-sah, Deceased, Respondents.*

Motion to Dismiss for Want of Jurisdiction.

Comes now, respondent, Laban Miles, and moves the court to dismiss the above-entitled and numbered cause for want of jurisdiction because no Federal question is properly raised or involved.

H. P. WHITE,
Attorney for Respondent, Laban Miles.

Service of the within and foregoing motion and the receipt of a carbon copy thereof is hereby acknowledged this of January, 1919.

For Petitioner, John Kenny.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 179.

JOHN KENNY, PETITIONER,

vs.

LABAN MILES AND JOHN L. BIRD, ADMINISTRATOR OF THE ESTATE OF LAH-TAH-SAH, DECEASED OSAGE INDIAN, ROLL NO. 256.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

SUPPLEMENTAL BRIEF FOR RESPONDENT LABAN MILES.

Oklahoma Indians were expressly excluded from the provisions of the act of Congress of June 25, 1910, 36 Stat. L., 855 (authorizing the Secretary of the Interior to determine heirs), by the last proviso of section 2, which reads:

> *"That sections one and two of this act shall not apply to the State of Oklahoma."* (Italics ours.)

This depended upon the validity of the marriage in question. The court held the marriage valid and that the widow was an heir to the estate, and reversed the trial court on this point.

Bilby *vs.* Brown, 34 Okla., 780, was an action for partition of real estate. Alice Shields, an enrolled Creek freedman, died, leaving a husband, and two children by a former husband. The surviving husband was a non-citizen of the Creek tribe. The question was whether the lands of Alice Shields, deceased, descended to her second husband and the two children by a former husband, or whether the lands descended to the two children and the brothers and sisters of the decedent, to the exclusion of the surviving husband, and in this connection the court said:

> "The court below held that the husband and two children of Alice Shields inherited the land, each taking a one-third interest. This judgment of the trial court was correct."

Irving *vs.* Diamond, 23 Okla., 325, was an action to partition the lands allotted to a child born December, 1895, and died August, 1900. The question was whether under the acts of Congress and the laws of the Creek Nation any part of the estate descended to the father. The court said:

> "It is contended on the part of plaintiffs in error that the land in its entirety was inherited by the mother on the death of the allottee, and that on her death it was inherited by her children, and that the deed of the father conveyed no title to Diamond. This contention we believe to be correct."

Thus the ownership of the land involved was ascertained by the determination of the legal heirs of the decedent, which was contested and adjudicated in the partition suit.

Barnett *vs.* Way, 29 Okla., 780, was an action for partition and to set aside and have canceled certain invalid deeds

as clouds upon the title to the lands in question. The court said:

> "The decree of that court (the court below) disposes of the void instruments satisfactorily to all parties, but that part of the decree which determines who the heirs of Cita Barnett, a deceased Creek Indian, are, and distributes among them her allotment of land, is complained of in this proceeding."

In this case the district court determined the heirs in the partition action and an appeal was taken to the Supreme Court of Oklahoma and there affirmed.

De Graffenreid *vs.* Iowa Land & Trust Co., 20 Okla., 687, was an action to quiet title, or for partition, or for sale of the lands involved, as the respective interests of the parties might appear, involving a Creek Indian allotment. After a long review the court concludes:

> "Hence, we are of the opinion that Cynthia Tolliver is entitled to an undivided one-half interest in the allotment in controversy, and Ben Reeves, husband of Castella Brown, her surviving, the remaining one-half."

Warren *vs.* Cannard, — Okla. —, 120 Pac., 599, was an action to quiet title involving ownership and right of possession dependent upon the determination of the legal heirs of a full-blood Creek Indian. The court in part said:

> "Frank L. Warren, the plaintiff in error, as plaintiff filed his petition in the District Court of Hughes County against Felix P. Canard, defendant, alleging that he was the owner and in possession of certain real estate, that the defendant claimed an interest therein, and *praying that he have judgment quieting title.* The defendant answered, admitting that the plaintiff was in possession of the real estate, but denying that he was the owner of it, and setting up title in himself. He alleged that he was a full-blooded Creek Indian; that in 1899 he married Nancy Leader, a

full-blooded Creek; that they had one child, named Stephen; that allotments were made, both to Nancy and Stephen; that Nancy died in 1903; that Stephen died in 1908; and that the defendant, by reason of these facts, inherited both of the allotments. The plaintiff replied with a general denial and a particular denial that the defendant ever married Nancy Leader, or that he was the father of Stephen Canard, and further pleaded that Stephen Canard was the illegitimate son of Nancy Leader; that when Nancy died Stephen inherited the lands allotted to her, and when Stephen died both allotments descended to the brothers and sister of Nancy Leader, who were the maternal uncles and aunt of Stephen Canard; and that these heirs had all conveyed to the plaintiffs. *The question involved is the marriage of the defendant and Nancy Leader.* The court found that the defendant was lawfully married to Nancy Leader, as alleged by him, and that there was born to the union one child, Stephen; that Nancy died in February, 1903; that Stephen died in September, 1908; that the land in controversy at the death of Stephen descended to the defendant as father; and that the grantors of the plaintiff therefore had no right to convey the same."

In Hall *vs.* Gabbert, 213 Ill., 208, *supra*, the court said:

"The parties in interest in the land are adults. The right to partition is fixed by statute, and where the rights of minors or infants are not involved the court may not refuse to *declare* the rights of the parties claiming to be owners of the land and decree partition among them according to their rights."

In Shorton *vs.* Judd, 42 Pac., 337, the Supreme Court of Kansas said:

"This action was commenced in behalf of the child, John Judd, June 19, 1890, for the purpose of setting aside the will and for the *partition* of said real estate; one-half to be set off to him and the other half to his mother, Sadie Runkle, free and clear of the claims of any of the other parties. On June 20, 1890, Sadie

> Runkle, defendant, filed answer, alleging that the will was void and asking for *partition* of the real estate and that she be given one-half thereof." (Italics ours.)

In passing on the question of jurisdiction the court said:

> "Counsel for plaintiff in error *contend that the district court had no jurisdiction of the subject of the action* and that relief should have been sought in the probate court by way of contribution, and sections 39, 58-62 of chapter 117, Gen. St. 1889, being an act relating to wills, are cited in support of this position. It is our opinion, however, that where relief is sought only as to real estate, and no part thereof has been sold for the payment of debts, and no division has been made, an heir may have specific relief as to the property itself and need not pursue the *circuitous* remedy of contribution in the probate court." (Italics ours.)

In *Hill vs. Reno et al.*, 112 Ill., 154, the Supreme Court of Illinois said:

> "Where a case is fairly brought within the law authorizing a *partition, the right to partition is imperative and absolutely binding upon courts of equity.* They are not clothed with such discretion as that, under a given state of facts, they may grant the relief or refuse it and yet commit no error. *To invoke this equitable remedy is a matter of right and not of mere grace.* (Italics ours.)

In *O'Keefe vs. Behrens*, 71 Kan., 469; 85 Pac., 555; 8 L. R. A. (N. S.), 354, the Supreme Court of Kansas said:

> "Immediately upon the death of the ancestor, title to his real estate descends to his heirs, subject only to appropriation for the payment of debts. *Black vs. Elliott*, 63 Kan., 211, 215; 88 Am. St. Rep., 239; 65 Pac., 215. *They are entitled to possession, and may require partition at once. Letters of administration may not be taken out for a long period of*

time or not at all. Much time may elapse before claims are presented or established, or before it may be known that the personal assets are insufficient. During such periods they are entitled to the separate enjoyment of their several portions of the estate and may proceed to enforce their rights unless some special state of facts should make it unjust or improper that they should do so. General creditors are not proper parties to partition proceedings at all, and the administrator should not be joined unless under exceptional circumstances. *Sheehan vs. Allen*, 67 Kan., 712; 74 Pac., 245. If, after partition, the administrator should require the land or some portion of it for the payment of debts, it may then be sold. *Sample vs. Sample*, 34 Kan., 73, 77; 8 Pac., 248. Therefore *it was not necessary that the heirs, as a condition of recovery, should either plead or prove that the decedent's estate had been settled* or that no debts existed for the payment of which the land might afterwards be appropriated. (Italics ours.)

"The granting to courts of probate of authority to partition the lands of decedents is not of itself a withdrawal of such authority from courts of chancery proceeding in suits brought by a tenant in common of such property. The jurisdiction of the two courts is concurrent. *Wilkison vs. Stuart*, 72 Ala., 198."

See cases cited at page 14 of our original brief, where the Federal Supreme Court affirmed decisions of District and Supreme Courts of Oklahoma, where Indian heirs were determined in actions to quiet title, actions in ejectment, and actions to determine heirs.

The action in the District Court of Osage County, Okla., in which the judgment pleaded in the case at bar as *res adjudicata* (printed R., pp. 15-17, "Exhibit A") was rendered, was an action for partition on the part of the plaintiff and an action to *quiet title* on the cross-petition of the defendant, John Kenny, on the questions he there raised and put in issue by his cross-petition. The court had jurisdiction to render a judgment quieting the title to the lands in Kenny on his cross-petition, irrespective as to whether the lands

were restricted or unrestricted. Suppose such a judgment had been rendered in Kenny's favor, such a judgment would not have been subject to the approval of the Secretary of the Interior, because no supervision whatever is given the Secretary in actions to quiet title. Miles's only remedy would have been his right of appeal. Likewise, when Kenny's claim as the sole heir set up in his cross-petition to quiet title in him was denied and he was awarded a one-half interest only, his only remedy was by appeal, and not having appealed therefrom it became final when the six months' period allowed for an appeal expired.

In Adkins *vs.* Arnold, 235 U. S., 417, the court said:

> "Under section 16, of the Creek Indian Allotment Act of June 30, 1902, c. 1323, 32 Stat., 500, only allotments to living members of the tribe in their own right were subject to restrictions upon alienation. Allotments on behalf of deceased members were left unrestricted."

To hold the lands involved in the case at bar to be restricted would be inconsistent with the holdings in the following cases:

Levindale Lead & Zinc Mining Co. *vs.* Coleman, 241 U. S., 432; Mullen *vs.* United States, 224 U. S., 448; Skenton *vs.* Dill, 235 U. S., 206; Sizemore *vs.* Brady, 235 U. S., 441; Woodward *vs.* De Graffenreid, 238 U. S., 284; and Adkins *vs.* Arnold, 235 U. S., 417.

The petitioner, in his brief at page 19, seemingly contends for a construction of section 7 of act of June 28, 1906, different from the construction placed thereon by this court in the Levindale case, *supra*, where the court said:

> "Emphasis is placed by the defendant in error on the provisions of section 7 as to leases; but it would be an inadmissible construction of this section to say that the word 'heirs' was there used in contradistinction to 'members.' This provision as to leases, in the

> light of the purpose of the act, had reference, we think, to the 'individual member' *who received allotments* and the Indian heirs of *such* members." (Italics ours.)

In other words, section 7 applies only to cases where restrictions have attached by reason of allotments of land allotted and deeded to a member of the tribe during his lifetime, and leases thereafter made by the original allottee, or in case of his death after receiving such restricted allotment, leases made thereon by his Indian heirs.

We call attention to the statement of this court in the Mullen case, *supra,* that:

> "No distinction is made between the heirs; they might or might not be members of the tribe and where there were a number of heirs, each would take his undivided share."

In the decision complained of, the Supreme Court of Oklahoma holds the same view and emphasizes the fact that no distinction has been made between heirs. The lands descend to all heirs alike, unless there is an express provision to the contrary, and there is none. The lands involved in the case at bar and the lands involved in the Levindale case, *supra,* descended to the heirs under the provisions of section 6 of the Osage act, *supra,* which provides:

> "That the lands, moneys, and mineral interests, herein provided for, of any *deceased* member of the Osage Tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or of the State in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys, and mineral interests must go to the mother and father equally."

In the Levindale case, *supra*, this court held that lands inherited by a white heir prior to their actual allotment to a member of the tribe entitled thereto at the time of death, that such lands descended to such white heir unrestricted. It therefore follows that as no distinction has been made between heirs, and that they may or may not be members of the tribe, and there being no express provision to the contrary, that such lands descend to any and all the heirs free from restrictions. No restrictions have been imposed upon inherited lands, as such, but only upon lands segregated, allotted, and deeded either as "homestead" or "surplus land." Lands could not thus be segregated and "come under the stated restrictions" until after the approval of the schedule of tentative allotments was approved by the Secretary, the first of which was November 19, 1908, three months after the death of Lah-tah-sah. She died before a segregation as to "homestead" and "surplus" could be made.

It is stated in the answer of petitioner filed in the county court (printed R., 20) that the Secretary of the Interior refused and failed to approve the judgment and proceedings of the district court. This is misleading. It implies that same were submitted to the Secretary and that he either refused or failed to approve same. Such was not the case, as the same has never been submitted for approval. When a sale of the lands are had under the order of the court the deeds will be submitted for approval, should it be eventually held that the lands are restricted.

The corrected and final opinion of the Supreme Court of Oklahoma is printed in the record, beginning at page 195. The opinion is elaborate and well reasoned and should be affirmed.

The judgment rendered by the district court in the partition suit, pleaded as *res adjudicata*, is printed in the record as "Exhibit A", pages 15-17.

The printed record shows (pp. 153-4) that respondent, John L. Bird, filed his resignation as administrator in the

county court on December 31, 1914; that on March 22 (p. 158), a petition for the appointment of W. O. Dildine as administrator of the estate was filed; that on May 20, 1915 (R., 160-161), an order discharging respondent, John L. Bird, and appointing W. O. Dildine administrator was made and entered; that letters of administration were issued to W. O. Dildine May 20, 1915 (R., 162), and that he qualified on the same day by giving bond (R., 163-4). The appeal was not filed in the Supreme Court of Oklahoma until September 28, 1915 (printed R., 1). This was four months after John L. Bird ceased to be administrator, and at a time when W. O. Dildine had been the administrator for four months. The administrator was a necessary party to the appeal, because it was from a judgment approving his report of receipts and disbursements, and ordering distribution of the estate in his hands by which he was bound, and would be bound by the decision on appeal if changed or modified. Dildine, the administrator, was not made a party in the State Supreme Court nor here, by reason whereof State Supreme Court acquired no jurisdiction. On this question the jurisdiction of this court depends on the jurisdiction of State Supreme Court, and this court is therefore without jurisdiction. We filed a motion to dismiss on this ground in the State Supreme Court (printed R., 147). Counsel for respondent, Laban Miles, does not represent either the respondent Bird, or the administrator Dildine.

Respectfully submitted,

H. P. WHITE,
Pawhuska, Oklahoma,
Attorney for Respondent, Laban Miles.

KENNY *v.* MILES ET AL.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 179. Argued January 24, 1919.—Decided May 19, 1919.

Subject to the provisions as to certificates of competency, lands allotted as homestead and surplus respectively, under the Act of June 28, 1906, c. 3572, 34 Stat. 539, in the right of a deceased Indian member of the Osage tribe, duly enrolled, and descending to Indian heirs, likewise members duly enrolled, are subject to the same restrictions on alienation as are imposed upon lands allotted to living members. P. 63. *Levindale Lead Co.* v. *Coleman*, 241 U. S. 432; *Mullen* v. *United States*, 224 U. S. 448; and *Skelton* v. *Dill*, 235 U. S. 206, distinguished.

Section 6 of the Act of April 18, 1912, c. 83, 37 Stat. 86, provides that "the lands of deceased Osage allottees, unless the heirs agree to partition the same, may be partitioned or sold upon proper order of any court of competent jurisdiction in accordance with the laws of the State of Oklahoma: *Provided*, That no partition or sale of the restricted lands of a deceased Osage allottee shall be valid until approved by the Secretary of the Interior." *Held:* (1) That the term "restricted lands" refers to the restrictions on alienation imposed by Congress to protect the Indians from their own incompetency, (p. 61); and (2) that, in the absence of approval by the Secretary, a judgment for partition or sale, in a suit brought under this section in the state court respecting such lands, is inoperative, so that a finding of heirship, forming a part of it, is not conclusive in other proceedings. P. 65.

162 Pac. Rep. 775, reversed.

58. Opinion of the Court.

THE case is stated in the opinion.

The Solicitor General, with whom *Mr. Assistant Attorney General Kearful* was on the brief, for petitioner.

Mr. H. P. White for respondents.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

In concluding a proceeding in the county court of Osage County, Oklahoma, for the settlement of the estate of Lah-tah-sah, a deceased Indian woman, it became necessary to determine who were her heirs. Two claimants appeared and sought to establish such a relation. One, John Kenny, claimed to be a son and the sole heir; and the other, Laban Miles, claimed to be the surviving husband and an equal heir with Kenny. It was conceded that Kenny was a son, but it was disputed that Miles ever was the deceased's husband. If he was such when she died, he and Kenny were equal heirs; otherwise Kenny was the sole heir.

At the hearing in that proceeding Miles produced and relied on a judgment in a partition suit, which he had brought against Kenny in the district court of the same county, wherein it was found that he and the deceased were married about a year before her death and that he remained her husband until she died. Over Kenny's protest, based on congressional enactments presently to be noticed, the county court treated that judgment as a conclusive determination of the matters so found and rejected evidence produced by Kenny to show that there had been no such marriage. It was accordingly adjudged that Miles and Kenny were equal heirs, and that decision was affirmed by the Supreme Court of the State. 162 Pac. Rep. 775. The case is here on writ of certiorari.

Whether, consistently with the congressional enactments on which Kenny's protest was based, the judgment in the partition suit could be treated as conclusive of the matters therein found is the ultimate federal question in the case.

Lah-tah-sah was an Indian of the Osage tribe, duly enrolled as such. This entitled her to share in the division and allotment of the lands and funds of the tribe under the Act of June 28, 1906, c. 3572, 34 Stat. 539. She died intestate August 19, 1908. Thereafter two tribal deeds naming her as grantee,[1] and approved by the Secretary of the Interior, were issued under that act. The deeds were for lands allotted to her or in her right out of the tribal lands. One was for 160 acres designated as a homestead, and the other was for 500.12 acres designated as surplus lands. Both purported to pass a title in fee simple, subject to the conditions, limitations and provisions of the act. It was to these lands that the judgment in the partition suit related. That judgment treated the lands as inherited from Lah-tah-sah and ordered that they be partitioned equally between Miles and Kenny as her heirs, or, if not susceptible of partition in kind, that they be sold with a view to an equal division of the proceeds.

By § 6 of the Act of April 18, 1912, c. 83, 37 Stat. 86, which is supplementary to and amendatory of the Act of 1906, it is provided that "the lands of deceased Osage allottees, unless the heirs agree to partition the same, may be partitioned or sold upon proper order of any court of competent jurisdiction in accordance with the laws of the State of Oklahoma: *Provided*, That no partition or sale of the restricted lands of a deceased Osage allottee shall be valid until approved by the Secretary of the Interior." It was after this enactment that the partition suit was

[1] As to the legal effect of the deeds issued to her after her death, see besides § 6 of the Act of 1906, Rev. Stats. § 2448; *Crews* v. *Burcham*, 1 Black, 352, 356; *United States* v. *Chase*, 245 U. S. 89, 101.

begun, and there was here no approval by the Secretary of the Interior.

Kenny's protest was based on the Acts of 1906 and 1912 and was to the effect that the lands to which the partition suit related were restricted lands and that in consequence the judgment for their partition or sale was of no effect in the absence of the prescribed approval by the Secretary of the Interior.

The term "restricted lands" in § 6 of the Act of 1912 means lands the alienation of which is subject to restrictions imposed by Congress to protect the Indians from their own incompetency. This is shown by a later sentence in the same section and by various provisions in the Act of 1906.

To determine whether the lands ordered to be partitioned or sold were restricted requires some consideration of the Act of 1906, for it was under that act that they were allotted and the tribal deeds issued. By its first section the act makes the tribal roll as existing January 1, 1906, with eliminations and additions not material here, the authentic roll of the members for the purposes of the act. By its second section it provides that the tribal lands, with stated exceptions, shall be divided among the members in such way as to give each a fair share in acres; that every member "shown by the roll" shall be permitted to select three tracts of 160 acres each; that after all have made the three selections the remaining lands, with some exceptions, shall be divided as equally as practicable by a designated commission, and that—

"Fourth. . . . Each member of said tribe shall be permitted to designate which of his three selections shall be a homestead,[1] and his certificate of allotment and deed shall designate the same as a homestead, and the same

[1] A subsequent joint resolution permitted the homestead to be designated from lands in any one or more of the three selections. February 27, 1909, 35 Stat. 1167.

shall be inalienable and nontaxable until otherwise provided by Act of Congress. The other two selections of each member, together with his share of the remaining lands allotted to the member, shall be known as surplus land, and shall be inalienable for twenty-five years, except as hereinafter provided."

The second section further provides (par. 7) that when any adult member is found fully competent to care for his own affairs the Secretary of the Interior may issue to him a certificate of competency authorizing him to sell and convey any of the lands deeded to him under the act other than his homestead, which where the certificate issues [1] is to remain inalienable for twenty-five years, or during the life of the homestead allottee. Other sections reserve to the tribe for twenty-five years the oil, gas, coal and other minerals in the allotted lands and provide that the tribal funds and moneys, with specified exceptions, shall be placed to the credit of the several members "shown by the authorized roll," or their heirs, on the basis of a pro rata division and shall be held in trust by the United States for twenty-five years. The sixth section is as follows:

"Sec. 6. That the lands, moneys, and mineral interests, herein provided for, of any deceased member of the Osage tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or of the State in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys, and mineral interests must go to the mother and father equally."

The seventh section shows that the allotted lands are for the sole use of the individual members, or their heirs, and that the same may be leased, subject to the restriction that to be effective "all leases," whether for the benefit of the individual members or their heirs, must have the

[1] See *Aaron* v. *United States*, 204 Fed. Rep. 943, 945-946.

approval of the Secretary of the Interior; and the eighth section provides that the deeds to allottees shall be executed by the principal chief of the tribe, but shall not be valid until the Secretary of the Interior approves them.

The Act of 1912, in its sixth section, treats the restraints applicable to living allottees as also applicable to such of the heirs of deceased allottees as are members of the tribe, and expressly provides that "when the heirs of such deceased allottees have certificates of competency . . . the restrictions on alienation are hereby removed."

Lah-tah-sah died without receiving a certificate of competency. Kenny and Miles, who claim to be her heirs, are of Osage blood and members of the tribe, and neither has received such a certificate. Thus the case differs materially from *Levindale Lead Co.* v. *Coleman*, 241 U. S. 432, where it was held to be obvious from an examination of the entire Act of 1906 that the restrictions on alienation were imposed to secure the welfare of Indians—wards of the United States—and were not intended to apply to lands, or undivided interests therein, inherited by white men who were not members of the tribe. There a white man, who as heir of a deceased Osage wife and child took an undivided interest in lands allotted in their behalf after their death, was held to have an unrestricted right to alienate his interest; but the court was careful to indicate that it was not dealing with the interests of Indian heirs.

The Act of 1906 makes it plain that all whose names were on the authentic roll were to share in the division of the tribal property. They were the "members" among whom the lands were to be allotted in stated portions. Lah-tah-sah, being one of them, was entitled to such an allotment. It was made in her name, but whether before or after her death is left uncertain by the record. The court below treated it as made after her death and held that the lands were not restricted, its decision being put

on the ground that the restrictions on alienation are not applicable to lands allotted in the right of deceased members, but only to such as are allotted to members living at that time. We cannot assent to that conclusion.

Under the Act of 1906 the death of a member entitled to an allotment does not extinguish his right. According to the implication of the act and the administrative rulings, the allotment still may be made in his name. Where this is done he is regarded as the allottee and his heirs as taking by descent from him. Such allotments and all others are made under one comprehensive provision, in which there is no distinctive mention of either living or deceased members. The restrictions are imposed by another provision equally comprehensive, and it makes no distinction between lands allotted to living members and those allotted in the right of deceased members. Nor is any such distinction made in the section dealing with descent. The heirs are generally Indians, and seldom white men. When they are Indians they are equally within the occasion for the restrictions, whether the allotment be to a living member or in the right of one deceased, *Talley* v. *Burgess*, 246 U. S. 104, 108; and in either case some may be without any allotment of their own, because born after the time for closing the roll. Thus those who take under allotments made in the right of deceased members are no less within the letter and spirit of the restrictions than are other heirs. That all are intended to be protected is shown by the leasing provision, which requires that "all leases" on the part of heirs shall have the approval of the Secretary of the Interior.

We, therefore, are of opinion that the lands allotted in Lah-tah-sah's name were restricted lands, whether allotted before or after her death.

The Act of 1906 is quite unlike the earlier acts considered in the cases of *Mullen* v. *United States*, 224 U. S. 448, and *Skelton* v. *Dill*, 235 U. S. 206, which are cited

in support of the conclusion below. Those acts, as was pointed out in our opinions, contained separate provisions for two classes of allotments—one to members living at the time, and the other in the right of deceased members. In the provisions dealing with the first class there were express restrictions on the right of alienation, and in those dealing with the second class there was an entire absence of such restrictions. Because of this difference in terms, we held that Congress intended that allotments of the second class should be unrestricted. The differences between those earlier acts and that of 1906 are pronounced and reasonably can be explained on no other theory than that Congress intended that all allotments under the Act of 1906 should be restricted, subject of course to the issue of certificates of competency. And that this is what was intended becomes even more manifest when it is considered that in the meantime Congress had imposed other restrictions in respect of allotments under the earlier acts and in doing so had discarded the distinction before made between the two classes of allotments so far as full-blood Indian heirs were concerned. *Talley* v. *Burgess, supra.*

We have seen that the provision in the Act of 1912 under which the partition suit was brought and entertained declares that where the lands are restricted, as was the case here, no partition or sale shall be valid until approved by the Secretary of the Interior. No approval was given in this instance. In consequence the judgment ordering a partition or sale—it had no other purpose—was inoperative. It could not be executed and was not binding on any one. The findings were part of it and were of no force apart from it.

It results that Kenny's protest against the use made of that judgment was well grounded.

Judgment reversed.